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RANKING, SPICER & PEGLER'S MERCANTILE LAW

INCORPORATING

**Partnership Law and The Law of
Arbitration and Awards**

EIGHTH EDITION

Edited by

W. W. BIGG, F.C.A., F.S.A.A.

and

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of Lincoln's Inn, Barrister-at-Law



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PREFACE TO THE EIGHTH EDITION

In preparing this new edition, the opportunity has been taken to revise the text completely and bring the book up-to-date in light of recent legislation and case decisions. New chapters have been added dealing with the Law of Arbitration and Awards and the Law of Partnership, and it is hoped that the inclusion of these subjects in the one volume will be of assistance to the reader.

We have pleasure in acknowledging the valuable assistance given to us by Mr. A. E. Langton, LL.B., F.C.A., F.S.A.A. with the preparation of this edition.

C. N. BEATTIE

W. W. BIGG

LONDON,

November, 1948.

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ABBREVIATIONS USED IN REFERENCE TO CASES CITED

Abbreviation.	Reports	Date	Court.
A.C.	House of Lords and Privy Council Appeal Cases	1891—	House of Lords.
Acct. L.R.	Accountant Law Reports	1874—	All.
A. & E.	Adolphus & Ellis	1834—1841	Queen's Bench.
All E.R.	All England Reports	1934—	All.
Ambl.	Ambler	1737—1783	Chancery.
App. Cas.	House of Lords and Privy Council Appeal Cases	1875—1891	House of Lords.
Atk.	Atkyns	1736—1754	Chancery.
B. & Ad.	Barnwall & Adolphus	1830—1834	King's Bench.
B. & Ald	Barnwall & Alderson	1771—1822	"
B. & C.	Barnwall & Cresswell	1822—1830	"
B. & L.	Browning & Lushington	1863—1865	Admiralty and Privy Council.
B. & S.	Best & Smith	1861—1870	Queen's Bench.
Beav.	Beaven	1838—1866	Rolls Court.
Bing.	Bingham	1824—1840	Common Pleas.
Bing. N.C.	Bingham's New Cases	1824—1840	"
Bligh. N.S.	Bligh's New Series	1827—1837	House of Lords.
Bos. & P.	Bosanquet and Puller's Reports	1796—1804	Chancery
Burr.	Burrows	1756—1772	King's Bench.
C.A.	Court of Appeal		
Camp.	Campbell	1807—1818	<i>Nisi Prius</i> .
C. & E.	Cababe & Ellis	1882—1885	Queen's Bench.
C. & P.	Carrington & Payne	1823—1840	<i>Nisi Prius</i> .
C.B.	Common Bench	1845—1865	Common Pleas.
C. B. N. S.	Common Bench New Series	1845—1865	"
Ch.	Chancery	1891—	Chancery.
Ch. App.	Chancery Appeals	1805—1875	"
Ch.D.	Chancery Division	1875—1891	"
Chit.	Chitty	1819—1820 (and some earlier cases)	King's Bench
Ch. Rep.	Chancery Reports	1615—1712	Chancery.
Com. Cas.	Commercial Cases	1895—	King's Bench.
Cowp.	Cowper	1774—1778	"
C.P.D.	Common Pleas Division	1875—1891	Common Pleas
Cr. & M.	Crompton & Meeson	1832—1834	Exchequer.
C. Rob.	Chr. Robinson	1798—1808	Admiralty.
D M & G	De Gex, Macnaghton and Gordon's Chancery Reports	1851—1857	Chancery
De G. & J.	De Gex & Jones	1857—1862	Chancery Appeals.
De G. & Sm.	De Gex & Smale	1846—1852	Chancery.
Dow	Dow	1812—1818	House of Lords.
Drew.	Drewry	1852—1859	Vice-Chancellor's Court.

Abbreviation	Reports	Date.	Court
E. & B.	Ellis & Blackburn	1852—1858	Queen's Bench.
E. & E.	Ellis & Ellis	1859—1861	"
East	East	1801—1812	King's Bench.
Esp.	Espinasse	1793—1806	King's Bench, Common Pleas, and <i>Nisi Prius</i> .
Ex.	Exchequer	1847—1856	Exchequer.
Exch.			
Ex D	Exchequer Division	1875—1880	Exchequer.
F. & F.	Foster & Finlason	1856—1867	<i>Nisi Prius</i> .
Giff.	Giffard	1857—1865	Chancery.
Gow	Gow	1818—1820	<i>Nisi Prius</i> .
H. & C.	Hurlstone & Coltman	1862—1865	Exchequer.
H. & M	Hemming & Miller	1862—1865	Vice-Chancellor's Court.
H. & N.	Hurlstone & Norman	1856—1862	Exchequer.
H.L.	House of Lords		
H.L.C.	House of Lords Cases	1846—1866	House of Lords.
Hobart	Hobart	1613—1625	Common Law.
Ir. L.R.	Irish Law Reports,	1867—1900	Queen's Bench, Ireland.
Q.B.D.	Queen's Bench Division		
Jac. & W.	Jacob & Walker	1819—1821	Chancery.
Johns. & H.	Johnson & Hemming	1860—1862	Vice-Chancellor's Court.
Jur	The Jurist	1837—1854	
K.B.	King's Bench Division	1901—	King's Bench.
Ld. Raym.	Lord Raymond	1694—1732	Common Law.
Lev.	Levinz	1680—1696	King's Bench and Common Pleas.
L. J., C.P	Law Journal, Common Pleas	1828—1876	Common Pleas.
L. J., Ex.	Law Journal, Exchequer	1828—1876	Exchequer
L. J., K.B.	Law Journal, King's Bench	1900—	King's Bench.
L. J., Q.R.	Law Journal, Queen's Bench	1828—1900	Queen's Bench
L. R.—Ch.	Chancery	1865—1875	Chancery.
L. R.—Ch. App.	Chancery Appeals	1865—1875	"
L. R.—O.P.	Common Pleas	1865—1875	Common Pleas
L. R.—Eq.	Equity	1865—1875	Chancery.
L. R.—Ex.	Exchequer	1865—1875	Exchequer.
L. R.—H L.	House of Lords	1865—1875	House of Lords.
L. R.—Ir.	Irish	1865—1875	Irish Courts.
L. R.—Q.B.	Queen's Bench	1865—1875	Queen's Bench.
L. T.	Law Times	1846—	All.
Macq.	Macqueen	1851—1865	House of Lords
M. & M.	Moody & Malkin	1826—1830	<i>Nisi Prius</i> .
Mer	Merivale's Chancery Reports	1815—1817	Chancery
Mod	Modern Reports (Leach's)	1669—1700	All.
Mont. & Ch.	Montague & Chitty	1838—1840	Bankruptcy.
M. & W.	Meeson & Wellsby	1836—1847	Exchequer.
Moo. P.C.	Moore's Privy Council Cases	1836—1862	Privy Council.
Moo. Rob.	Moody & Robinson	1830—1844	<i>Nisi Prius</i> .
Morrel	Morrel, Bankruptcy Reports	1884—1893	Bankruptcy.
N. R.	New Reports	1862—1865	All.

Abbreviation.	Reports.	Date	Court.
P.C.	Privy Council		
P.D.	Probate Division	1875—	Probate & Admiralty.
Peake, Add. Ca.	Peake's Additional Cases	1795—1812	<i>Nisi Prius</i> .
Q.B.	Queen's Bench	1841—1852	Queen's Bench.
Q.B.D.	Queen's Bench Division	1875—1891	„
Roll Ab	Rolle's Abridgment		
R. P.O	Reports of Patent Cases	1884—	All.
Sc.	Scotch Cases		
Sim.	Simons	1828—1849	Chancery.
Sm. L. C.	Smith's Leading Cases		Common Law.
Stark.	Starkie	1815—1823	<i>Nisi Prius</i> .
Taunt.	Taunton	1807—1819	Common Pleas.
T. L. R.	Times Law Reports	1884—	All.
T. R.	Term Reports (Durnford & East)	1785—1800	King's Bench.
Ves.	Vesey, Junior	1789—1816	Chancery.
Willes	Willes	1737—1758	Common Pleas
W. R.	Weekly Reporter	1852—	All.
Y. & C.	Young & Collyer	1834—1842	Vice-Chancellor's Court.

INTRODUCTION

The theory of English Law is that all justice proceeds from the King, and the student of history will remember that there have been times when the Judges, with whom the administration of justice actually resides, were not so independent both of Royal favour and public opinion as is the case at the present day.

The unique authority of the Judges has arisen very largely from the great traditions of the Bench, and by reason of the number of really great men who have from time to time held the judicial office. But it is also largely due to the safeguards with which Parliament has surrounded them.

Since the Act of Settlement, 1701, it has only been possible to remove a Judge from his office by means of a joint address of both Houses of Parliament to the King. They hold their office during good behaviour, and no action can be brought against them for anything said or done in their judicial capacity. Their salaries are charged upon the Consolidated Fund, and are not subject to annual revision by vote in Parliament, the consequence being that they are exempt to a large extent from criticism in the House of Commons, which might otherwise arise.

The English Courts of Law may be divided broadly into civil and criminal Courts, with the former alone of which the subject of this book is concerned. The principal civil Courts are the County Courts, the Supreme Court of Judicature with its two branches, the High Court of Justice and the Court of Appeal, and the House of Lords.

County Courts, though the name is of great antiquity, were instituted in their present form in 1846 for the recovery of small debts and demands. The Legislature has, however, continually added to their original jurisdiction, which now extends to claims at Common Law up to £200, and to various heads of equitable claim up to £500, while the principal Courts possess local jurisdiction in Bankruptcy—unlimited—and also in the Winding-up of Companies where the paid-up capital does not exceed £10,000, as well as in contentious proceedings relating to the proving of wills or the grant of letters of administration where the personalty does not exceed £200. There is also a limited Admiralty jurisdiction in certain County Courts

Certain actions, such as for libel, slander, breach of promise, etc., are not within the jurisdiction of County Courts.

The High Court of Justice consists of three Divisions, i.e., the King's Bench Division, the Chancery Division, and the Probate, Divorce and Admiralty Division.

The Lord Chief Justice of England and nineteen puisne or younger Judges constitute the King's Bench Division. The Lord Chancellor and six puisne Judges constitute the Chancery Division, and in the Probate, Divorce and Admiralty Division, the President of the Court is assisted by four puisne Judges.

The King's Bench deals with most business actions, including those arising out of contract or tort; but the Probate, Divorce and Admiralty Division deals with actions relating to shipping, such as salvage, collisions of ships, etc., in addition to Probate and Divorce cases. The Chancery Division deals with litigation as to trusts, partnerships, patents, copyrights, etc., as well as bankruptcy matters and the winding-up of Companies.

A special Court, known as the Commercial Court, sits in the King's Bench Division for the purpose of dealing with cases arising out of the ordinary transactions of merchants and traders, such as the construction of documents, mercantile usages, etc. The procedure is somewhat more summary than in the King's Bench Division proper, and the decision as to whether a case shall go to this Court is made by the Master.

A Divisional Court is a Court of the High Court of Justice consisting of two Judges, for the purpose of hearing appeals from Judges in Chambers, cases stated by Justices, etc.; in all other cases the High Court Judges act alone.

The Court of Appeal is the higher branch of the Supreme Court of Judicature, and consists of the Lord Chancellor, as President, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, and eight Judges, known as Lords Justices of Appeal. The principal functions of the Court of Appeal are to hear appeals from the High Court and County Courts on questions of law, practice and procedure, and applications for new trials. For most purposes three Lords Justices are necessary to form a Court.

The House of Lords is the highest Court of Justice, and consists of the Lord Chancellor, peers who hold or have held high judicial office, and the Lords of Appeal in Ordinary for the time being. To this Court all final appeals are taken from the Court of Appeal

in England, and it also has jurisdiction with regard to Scottish and Irish matters. At least three Law Lords are necessary to form a Court. If the number is greater than three and they are evenly divided in opinion, the Court of Appeal decision prevails.

There is also another Tribunal, the Judicial Committee of the Privy Council, which has, however, very little jurisdiction in domestic matters. Its chief function is to hear appeals from the decisions of the Supreme Courts of the Colonies and Dominions of the Crown. This Committee is composed practically of the same class of persons who are qualified to act in hearing appeals to the House of Lords.

The law upon which the rights of individuals are founded, and which it is the duty of the Courts to interpret, consists of the Common Law of England, the Statute Law, and the Rules of Equity.

The Common Law of England consists of the law which has arisen and been founded upon the immemorial usage or custom of the Realm as recognised by the Courts, much of which has gradually been incorporated into the Statutes passed by Parliament. Although the Courts in their decisions only professed to be declaring and explaining the Common Law as it had always existed, in fact these decisions often themselves created, and are the only authority for, the law as thus laid down. This "Case Law," as it is called, is binding on every Court having a jurisdiction inferior to that of the Court which gave the decision, and even Courts of equal jurisdiction seldom fail to follow the earlier decision, especially when it is of long standing and has never been questioned.

The Statute Law consists of the various Acts of Parliament passed from time to time which may create new law or may declare or overrule the existing Common Law.

The Common Law of England was understood to be based entirely on custom and precedent. If, therefore, one wished to bring an action at Common Law, it had to be shown that the cause of complaint was governed by custom or by some established precedent, otherwise the Common Law Courts could give no remedy. It was owing to this that there arose a class of special pleaders, who were skilled in so drafting the form of a plaint that it should come within the scope of some precedent. There was, however, always a fiction that the King, as the source of all justice, was in possession of certain principles of law which were unknown to the Common Law Judges, and that by the application of these

principles he could mitigate the harshness of the Common Law and give relief where it could not be obtained at Common Law. These sacred principles were administered in the King's Chancery by the Chancellor and his assistants, who were all ecclesiastics and who, as a matter of fact, applied the rules of Roman Law, with which they were well acquainted. These rules were the rules of Equity as distinct from the rules of Common Law.

The various Judicature Acts now consolidated by the Supreme Court of Judicature Act, 1925, have very much diminished the importance of the distinction between Courts of Law and Courts of Equity, since the Common Law Courts can now give equitable relief, and the Chancery Division can give Common Law remedies.

The *Lex Mercatoria* or Law Merchant is derived very largely from the customs of Merchants, which, though binding between the Merchants themselves, were not at one time judicially recognised by the Courts of the King.

Thus, at an early period of English History, most Markets and Fairs had their own Courts, for the purpose of settling disputes and punishing misdemeanours in connection with that market or fair, e.g., Court of Clerk of the Market, Court of *pie'd poudre*, Courts of Staple. In the case of the Court of *pie'd poudre* (or Court of the dusty foot), the Steward of the owner of the toll of the Market was the Judge; and the summary manner in which he performed his judicial functions is presumed to have given rise to the name of the Court, for justice was meted out as swiftly as dust fell from the foot.

Even when in the course of time the customs of Merchants came to be recognised by the King's Courts, the existence of such customs had to be proved as fact in cases of doubt, and they were only binding upon the Merchants themselves.

Owing largely to the influence of Lord Holt and Lord Mansfield, in the 17th and 18th centuries, those customs were incorporated into the Common Law of England, and became binding upon all parties, whether Merchants or not.

The Law Merchant, then, is "neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of the Courts of Law, which, upon such usages being proved before them, have adopted them as settled law, with a view to the interests of trade and the public convenience, the Court proceeding herein on the well-known principle of law that, with reference to transactions in the different

departments of trade, Courts of Law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the Common Law, and may thus be said to form part of it " (*Goodwin v. Roberts* (1875), L R. 10 Ex. 346).

Since the judicial recognition of the Law Merchant, the expansion of trade and commerce has necessitated Statutes being passed from time to time, with the view of declaring the law more clearly than it would appear from case law alone, and with the object of remedying defects in the existing law. The work that has been done in this respect is of the utmost value, and such Statutes as the Sale of Goods Act, 1893, and the Bills of Exchange Act, 1882, which will be found dealt with in the following pages, are fine examples of codification, which have evolved order out of confusion, and rendered the subject more intelligible than it would otherwise have been to those not exclusively engaged in the study of the law.

Emergency legislation passed during the war years has made inroads into freedom of contract and has regulated in some form or another almost all activities in the national life. Most of these statutes and the regulations made thereunder are still in force and must constantly be borne in mind in giving legal advice. In a students' text-book such as this it has not been thought advisable to incorporate any of these provisions in the text, nor can a student be expected to acquire any detailed knowledge of the various statutory Rules and Orders, which now number more than nine thousand. Mention should, however, be made of the Courts (Emergency Powers) Act, 1943.

By Section 1 of this Act, a person is not entitled, except with leave of the Court, to levy execution or otherwise to enforce any judgment or order of any Court for the payment or recovery of a sum of money. Thus, the issuing of a Bankruptcy Notice or the presenting of a Bankruptcy Petition to enforce a judgment debt, are prohibited except with leave of the Court. This prohibition does not apply to judgments in tort, judgments for costs only, bastardy and affiliation orders, criminal proceedings, or proceedings for the recovery of penalties. Other matters which are prohibited without the leave of the Court are :—

- (a) The levying of a distress by a landlord.
- (b) The taking of possession of any property. This prohibits the owner under a Hire Purchase Agreement from taking possession of the goods without the leave of the Court.
- (c) The exercise of various remedies of a mortgagee.

The Court has power to refuse leave for the exercise of the right or remedy, or to give leave subject to restrictions and conditions, if it appears that the person liable is in difficulties by reason of circumstances directly or indirectly attributable to the war.

It will be noted that throughout this and other text-books, a statement as to the law is frequently followed by a reference to a case in which such law may be found declared or illustrated. These cases are contained in "Reports" to which reference is made by the recognised abbreviations (see p. xlv). At the present time the official or "Authorised" reports consist of—"Appeal Cases," which contain cases decided in the House of Lords and Judicial Committee of the Privy Council only; "King's Bench Division," containing cases decided in that Division and decisions of the Court of Appeal in appeals from that Division; "Chancery Division," and ' Probate, Divorce and Admiralty Division," to which *mutatis mutandis*, the same remarks apply. In addition to these authorised reports, there are others of recognised authority, such as the Times Law Reports.

31st July, 1948.

11.—DISCHARGE OF THE CONTRACT.

(a) Discharge by Agreement.

- (1) Waiver.
- (2) Substituted Agreement.
- (3) Condition subsequent.

(b) Discharge by Performance.

- (1) Actual Performance.
- (2) Payment.
- (3) Legal Tender.
- (4) Appropriation of Payment
- (5) Receipts.
- (6) Interest on Debts.
- (7) Accord and Satisfaction.

(c) Discharge by Breach.

- (1) Renunciation.
- (2) Failure of Performance.
- (3) Remedies for Breach of Contract.
 - (a) Damages.
 - (b) Specific Performance.
 - (c) Injunction.
 - (d) *Quantum meruit*.
- (4) Remedies against third party procuring breach.

(d) Impossibility.

- (1) Antecedent Impossibility.
- (2) Subsequent Impossibility.
- (3) Law Reform (Frustrated Contracts) Act, 1943.

(e) Operation of Law.

- (1) Merger.
- (2) Bankruptcy.
- (3) Limitation Act, 1939.

12.—VARIATION OF THE CONTRACT.

13.—CONSTRUCTION OF THE CONTRACT.

14.—CONFLICT OF LAWS.

15.—ENFORCEMENT OF FOREIGN JUDGMENTS.

CHAPTER I

CONTRACTS

Mercantile Law is the term used to denote that part of the general law of the country which is concerned with such matters as are usually the subject of what may be called business transactions. (We have referred to its origin in our Introduction, but however it may have originated, it is now only a branch of the general Law of Contract, that is, of one of the two main divisions of law as administered in the civil courts of this country; the other, the Law of Torts, being concerned with legal wrongs which arise otherwise than through breaches of contract, such as trespass or libel.

The Law of Contract is for the sake of convenience considered in Text Books under several heads, such as Agency, Sale of Goods, and so on, and which, so far as they affect Mercantile Law, form the subject of succeeding chapters. But it must be remembered that all these are only parts of the general law of contract, and are all governed by those broad principles of law which are dealt with in this chapter.

What is perhaps one of the most surprising features of trade and commerce is the fact that so many persons engaged in it are daily making contracts, and acquiring rights and undertaking liabilities under such contracts, without being aware, in the slightest degree, of the law governing their actions; but the fact that knowledge of the law is not possessed on any particular matter is no excuse for the person who becomes involved in the law. The maxim is,

ignorantia juris neminem excusat (ignorance of the law excuses no one), and a man is as much bound by the legal consequences of his acts as if he had actually known the law ; and it is assumed that when a contract is entered into, the parties to it were aware of, and made allowances for, the legal consequences which would follow upon the breaking of the agreement.

It is therefore extremely important to know what agreements the Courts thus dignify by the name of contracts and which they will enforce. In respect of an agreement which is not a contract, there is no redress if either party fails to carry it out ; but the breach of a contract always gives rise to a legal remedy ; thus in *Rose & Frank Co. v. Crompton Bros. Ltd.* ((1925), A.C. 445) an agreement contained a clause to the effect that the agreement was to be binding in honour only, and it was held by the House of Lords that the Courts must give effect to the clause, and that consequently an action could not be sustained on the agreement. In *Appleson v. Littlewood, Ltd.* ((1939), 1 All E.R. 464) it was held that no legally enforceable contract arose where an entrant in a football pool signed a form stating that the sending in or acceptance thereof should not be attended by legal consequences.

§ 1.—Definition of a Contract.

A contract is an agreement between two or more persons, which may be legally enforced if the law is properly invoked. (In every contract, therefore, it may be inferred that some right is acquired by one party and a correlative obligation or liability is undertaken by the other. Rights and obligations may attach to each party, but the nature of the contract

must be considered in order to determine in whom the primary right resides.)

It will be shown later (*see* § 3) that for a contract to be valid certain essentials must be satisfied; and if any one of such essentials is deficient, the contract may be either voidable or void. And even if every essential of a valid contract is satisfied, it may be unenforceable by reason of non-compliance with certain legal rules.

Since the terms "void" and "voidable" will be frequently used in this Chapter, a clear understanding of their meaning must be obtained.

A **VOIDABLE** contract is one which is capable of affirmation or repudiation at the option of one of the parties, *e.g.*, a continuous contract entered into by an infant.

A **VOID** contract is one that is destitute of legal effect, *e.g.*, a contract for the sale of goods, other than necessities, to an infant, or one which is impossible of performance. From the usually accepted definition, it might be inferred that a void contract is illegal, but whilst it is true that an illegal contract, *i.e.*, one which contravenes the law, whether Common Law or Statute Law, is void, the latter term is much wider in its application.

An **UNENFORCEABLE** contract is one that is not capable of proof, *e.g.*, where the necessary memorandum required under the Statute of Frauds has not been brought into existence, or where a contract in writing has not been properly stamped (though this may be rectified on payment of a fine to the Revenue Authorities), or where the remedy has been barred by lapse of time. The contract itself may be perfectly valid, and may be honourably carried out

by the parties concerned ; but in the event of breach or repudiation, the legal remedies to secure performance or obtain damages are barred by reason of the absence of evidence or the other circumstances which render the contract unenforceable.

§ 2.—Classification of Contracts.

Contracts are divisible into three classes, i.e.,

- (a) Contracts of Record ;
- (b) Specialty Contracts ;
- (c) Simple or Parol Contracts.

(a) Contracts of Record.

A contract of record is the obligation which is imposed by the entry in the parchment rolls of the proceedings in a Court of Record. The principal classes of contracts of record, which are now found, are judgments and recognizances.

(1) *Judgments.*

A judgment is an obligation imposed upon one or more parties, in favour of another or others, by a Court of Record ; and it depends for its binding force, not upon the consent of the parties, but upon the authority of the Judicial Representative of the Sovereign delivering the judgment. A judgment is therefore an order of the Court, and since it is an obligation imposed upon a party, it is not strictly a contract which rests upon agreement.

(2) *Recognizances.*

A recognizance is a contract made with the Sovereign through his Judicial Representative. It is, generally, in the nature of a promise to do some particular act, or to answer to a penalty stated

in the recognizance ; such as an undertaking by a person tried upon a criminal charge to come up for judgment if called upon, or a promise to pay a specified sum of money if an accused person, out on bail, does not appear at the trial.

The terms of a contract of record admit of no dispute, but are conclusively proved by the record itself. It also merges within itself any previously existing contract relating to the same matter ; and is the highest form of contract in English law.

(b) Specialty Contracts.

A specialty contract, or deed, is one which is not only reduced to writing, but is also executed under seal, and delivered. Both sealing and signature are essential for the proper execution of a deed (Law of Property Act, 1925, § 73).

The delivery may be actual or constructive ; as a general rule it is made simultaneously with execution. The modern method is to affix a wafer, which the party executing will touch with his finger, saying "I deliver this as my act and deed."

The characteristics of specialty contracts are dealt with in *post* § 6 (a).

(c) Simple Contracts.

A simple contract is one which is created, either by a verbal promise, by writing not under seal, or by implication. A parol contract is, strictly, a contract entered into by word of mouth ; but the term is frequently used to denote all simple contracts, and this is due to the fact that before the Statute of Frauds was passed there was no difference at Common Law between an agreement by word of mouth and an agreement by writing not under seal.

Most contracts entered into in ordinary commercial transactions fall within this classification.

A contract by implication arises where either there is no express contract in existence but some right and correlative obligation are inferred by reason of the circumstances, or the parties are already in contractual relationship upon some matter and collateral terms are to be inferred therefrom. As an illustration of the former class, a surety who has been called upon to pay a debt which the debtor has failed to discharge, can claim contribution from a co-surety; or an agent of necessity (*q.v.*) can claim reimbursement from the person in whose interests he has acted. The right of an agent to remuneration where the contract had made no specific provision affords an example of the latter class; the law assumes a promise to pay a reasonable or customary amount for the services rendered. Contracts arising by implication are sometimes referred to as *quasi-contracts*. Contracts may also be implied where a party indicates his intention by a mere act, *e.g.*, boarding an omnibus or beckoning the driver of a taxi.

§ 3.—The Essentials of a Contract.

The essentials of a valid contract are :—

- (1) Offer and acceptance, *i.e.*, a distinct communication by the parties to one another of their intention;
- (2) Genuineness of the consent expressed in the offer and acceptance;
- (3) Form, or consideration, constituting the evidence required by law of the intention of the parties to effect their legal relations;

- (4) The capacity of parties to make a valid contract ;
- (5) Legality of the object ;
- (6) Possibility of performance at the time the contract is entered into.

If any of these elements be wanting, the contract will be either void or voidable ; but even if they are all present in the agreement, the contract may still be unenforceable (*see* § 1).

§ 4.—Offer and Acceptance.

Offer and acceptance may take place in one of four ways :—

- (1) In the offer to make a promise, or to accept a promise made, followed by simple assent. This, in English law, is only applicable to contracts under seal, since no promise not under seal is binding, unless there has been valuable consideration ;
- (2) In the offer of an act for a promise ; as in the common case of an omnibus plying for hire ;
- (3) In the offer of a promise for an act ; as where a reward is offered for the recovery of lost property ;
- (4) In the offer of a promise for a promise, as where A. promises to pay B. a certain sum on a future day, if B. will promise to perform certain services for him. In this case the consideration on both sides is executory (*see infra*).

The offer or acceptance, or both, may be made either by words or by conduct. If A. sends goods to B.'s house, and B. accepts or uses the goods, B. will be liable on an implied contract to pay what

the goods are worth; the offer is made by sending the goods, the acceptance, by their use or consumption.

If the contract be completed by one of the parties, it is an EXECUTED contract; but if something has still to be done by both parties, it is an EXECUTORY contract.

An offer to be capable of acceptance must be definite in its terms, not leaving matters to be agreed in the future. Thus, a purported acceptance of an offer to buy a lorry "on hire-purchase terms" does not constitute a contract, because the hire purchase terms remain to be agreed (*Scammell (G) & Nephew, Ltd. v. Ouston* (1941), A.C. 251). Similarly, an agreement "subject to war clause" is too vague to be an enforceable contract (*Bishop & Baxter, Ltd. v. Anglo-Eastern Trading & Industrial Co. Limited* (1944), K.B. 12).

(a) Communication of Offer.

An offer is made when it is COMMUNICATED to the offeree, and not until this has been done. But it may be made generally, and the contract will then only arise when it has been accepted by a definite person (*Carlill v. Carbolic Smoke Ball Co.* (1893), 1 Q.B. 256 (see p. 19 *post*); *Williams v. Carwardine* (1833), 4 B. & Ad. 621).

If A. does work for B. without the request or knowledge of B., he cannot sue for the value of his work (*Taylor v. Laird* (1856), 25 L. J. Ex. 329); an acceptance of services may be sufficient to show an implied contract to pay for them, if at the time the defendant had power to refuse or accept the services, but the opportunity of accepting or rejecting must be given.

When an offer consists of various terms, some of which do not appear on the face of it, the point frequently arises as to what extent an acceptor is bound by terms of which he was not aware; as in contracts entered into with a railway company, *e.g.*, when a ticket is taken for a journey, or for luggage left at a cloak-room. The rule is laid down in *Watkins v. Rymill* ((1883), 10 Q.B.D. 178) that, if the form stating the terms is accepted without objection by the person to whom it is tendered, he is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the documents, or otherwise informs himself of its contents, or not. The exceptions to this rule are :—

- (1) Where the offer contains on its face the terms of a complete contract, then the acceptor will not be bound by any other terms intended to be included in it, and which were not ostensibly connected with that which is printed or written upon the face of the contract presented to him.

Chapelton v. Barry Urban District Council ((1940), 1 K B 532).

Beside a stack of deck chairs was a notice stating: "Hire of chairs Twopence per Session." The plaintiff bought two tickets, glanced at them and slipped them into his pocket without being aware that they contained any conditions. On the back of the tickets were the words "The Council will not be liable for any accident or damage arising from hire of chair." When the plaintiff sat down the chair gave way and he was injured. He claimed damages from the Corporation.

Held: On the facts, the plaintiff was not bound by the conditions and was entitled to recover. He was entitled to assume that the only conditions were those printed on the notice displayed near the deck chairs.

- (2) Where the notice calling his attention to the terms which it included was not sufficient.

Sugar v. London Midland & Scottish Railway Company ((1941), 1 All E.R. 172).

Where the date stamp on a railway ticket obliterated the words "For conditions see back," it was held that the passenger was not bound by the conditions (of which he had no actual knowledge) on the grounds that no steps reasonably sufficient to bring them to his notice had been taken

(b) Lapse of Offer.

An offer may lapse—

- (1) By the death of either party before acceptance ;
- (2) By failure to accept in the stipulated manner, if a specific mode of acceptance is prescribed ;
- (3) By the failure to accept within the time prescribed, or otherwise within a reasonable time (*Ramsgate Hotel Company v. Montefiore* (1866), 1 Ex. 109).

(c) Revocation of Offer.

An offer may be revoked at any time *before acceptance*. An exception ^{to} this rule is made by the Companies Act, 1948, § 50 (5), whereby an application for shares in or debentures of a company which is made in pursuance of a prospectus issued generally is not usually revocable until after the expiration of the third day after the time of the opening of the subscription lists.

In *Great Northern Railway Company v Witham* ((1873), 9 C.P. 16) the company advertised for tenders for the supply of iron as might be wanted by them between November, 1871, and October, 1872, and Witham's tender was accepted. After executing orders given for some time, Witham refused to execute any more, and the company sued him for non-performance, and Witham was held liable.

A tender under these circumstances, when accepted, imports an offer on the part of the person making the tender to supply the goods prescribed at the stated prices. The party to whom the tender is made is not

under any obligation to order any goods, but if he does so, the terms of the tender must then be observed.

Revocation of an offer, in order to be operative, must be communicated and brought to the knowledge of the offeree.

In *Byrne v. Van Tienhoven* ((1880), 5 C.P.D. 344) the defendant made an offer to the plaintiff on 1st October, asking for a reply by cable. The offer was received on 11th October, and immediately accepted in the method indicated. The defendant had posted a letter revoking his offer on 8th October, but the letter did not reach the plaintiff until 20th October. It was held that the revocation, not having been brought to the knowledge of the offeree before acceptance, was inoperative.

A party who, without consideration, gives time to another to accept or reject a proposal, is not bound to wait till the time expires, but may withdraw the proposal at any time before acceptance, inasmuch as the giving of time is all on one side (*Cooke v. Oxley* (1790), 3 T.R. 653); although the party giving the time is bound until he has communicated his revocation of the proposal to the other party (*Stevenson v. McLean* (1880), 5 Q.B.D. 346.) If an offer has been made for the sale of property, and, before that offer is accepted, the person who makes it agrees to sell the property to someone else, and the person to whom the first offer was made receives notice in some way that the property has been sold to another, he cannot, after that, make a binding contract by accepting the offer which was made to him (*Dickinson v. Dodds* (1876), 2 Ch. D. 468). Some doubt has been expressed as to the justice of this decision, since although it is clear that an offer can be revoked by the offeror at any time before acceptance, is the offeree to be bound by a communication made to him by an unauthorised third party? Such a communication

might be made even though no time had been given by the offeror within which acceptance is to take place, and where the offeror and offeree are not in direct contact, a reasonable time for acceptance is an implied term; as to what constitutes a reasonable time is a matter of fact to be determined from the circumstances. The promise to keep the offer open for a specified time is in the nature of a subsidiary promise, and, to be enforceable, requires consideration. By giving such consideration the interests of the offeree can be safeguarded.

✓ If an offeror agrees by deed to keep the offer open he cannot withdraw it, owing to the operation of the doctrine of estoppel. (*See* § 6 (a) *post*.)

✓ It is always an important matter to determine from which party the offer emanates. In the case of the issue of a prospectus by a company, if the offer were to be regarded as being made by the company, and the acceptance by the persons willing to take up shares, the result might be the cause of some embarrassment to the former, as the number of shares to be allotted might not be sufficient to cover the demands of the public. The prospectus is therefore deemed to be an invitation to offer; the persons applying for the shares make the offer, and the company is then free to accept or refuse the offers as circumstances may dictate.

Again, is a trader who advertises goods for sale, or who exhibits goods for sale in a shop window, making an offer? It is submitted that such an act must be regarded as of the nature of an invitation. Even the quotation of a price would not constitute an offer, but is intended merely as the basis of negotiation, and to convey information to an intending offeror. If replies to advertisements are to be sent by post, as would be the

case in a mail order business, and the public wished to purchase goods beyond the capacity of the advertiser to supply, how is the latter to know who had first posted his letter, a point which would be vital if the advertisement were to be regarded as an offer? And in the case of goods exposed in a shop window, since a trader does not so exhibit all the goods he has for sale, can there be one law for the goods displayed and another for those in the shop?

(d) Acceptance must agree with Offer.

The acceptance of an offer must agree entirely with the terms of the offer, and must not be conditional. If acceptance be made, but on other terms than those originally proposed, this amounts to a refusal of the original offer and a counter-proposal.

Where there is a communicated offer, and an unconditional acceptance of the offer, the Court will not go into the question of the motive which induced the acceptance (*Williams v. Carwardine* (1833), 4 B. & Ad. 621). In this case, a woman gave certain information for which a reward had been offered, not to obtain the reward, but to ease her conscience. She was nevertheless able to claim the reward.

(e) Offer or Acceptance "Subject to Contract."

When an offer or acceptance is made "subject to contract" or by the use of like words, it is a question of construction whether the parties do or do not intend to be bound before a formal contract is signed.

Sometimes the intention is that the parties shall be bound by the informal agreement, which is afterwards to be put into more precise and formal language.

Branca v. Cobarro ((1947), K.B. 854).

An agreement contained the words "This is a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed."

Held: This language, particularly the word "until," implied that the agreement was intended to be immediately binding and to remain so unless and until superseded by a subsequent formal agreement.

On the other hand, the words "subject to contract" frequently imply that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged. In such cases there is no contract until the formal agreement has been signed.

Spottiswoode, Ballantyne & Co. Limited v. Doreen Appliances Limited ((1942), 2 K B 32).

An agreement contained the words "subject in the usual way to your references being satisfactory, and to the terms of a formal agreement to be prepared by our solicitors."

Held: The intention of the parties was that no contract should exist unless and until a formal agreement had been entered into.

The point of time at which such agreements become binding is usually when physical exchange of contracts takes place.

Eccles v. Bryant & anor. ((1948), 1 Ch. 93, Ch. 66).

Vendors agreed to sell freehold property to a purchaser subject to contract. On 11th June the vendors' solicitors wrote to the purchaser's solicitors stating that the vendors had signed their part of the contract and that they were ready to exchange. The purchaser signed the duplicate contract and his solicitors posted it to the vendors' solicitors on 18th June. The vendors changed their minds and did not send their part in exchange.

Held: There was no contract, since the parties did not intend to be bound until exchange of parts had taken place.

(f) Communication of Acceptance.

The acceptance must be communicated by the acceptor. As to what will amount to communication

of acceptance where the acceptance invited is the doing of an act, will depend on whether the offer is a general one, made to the world at large, in which case the doing of the act is sufficient communication of acceptance ; or, whether it is the offer of a promise for an act, made to a specified individual, when actual communication of the acceptance would be required.

The acceptance is communicated when it is made in a manner prescribed or indicated by the offeror. Till the offer is accepted there is no contract, and neither party is bound, and the offer may be revoked by due notice of revocation to the party to whom it was made.

The difference between the communication of an offer and the communication of an acceptance is that an offer cannot be said to be communicated till it is brought to the knowledge of the offeree ; but the acceptance may be communicated so as to bind the offeror, although it may not come to his knowledge ; in other words, the medium of communication is the agent of the offeror.

If an offer is made by post, it must be taken, in the absence of any request to the contrary, to invite a reply through the post. If the offer is then revoked, it still remains open during the whole time a letter of revocation is in transit ; but the acceptance is complete the moment the letter of acceptance is posted, even though the letter never reaches the offeror (*Household Fire Insurance Company v. Grant* (1879), 4 Ex. D. 216).

In *Henthorn v. Fraser* ((1892), 2 Ch. 27, C.A. 33) Lord Herschell said :

"Where the circumstances are such that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

Even if the acceptance were immediately revoked by telegram, such revocation would be inoperative. Delivery of the letter to a postman not duly authorised to receive letters for posting is not equivalent to posting (*London & Northern Bank* (1900), 1 Ch. 220).

The contract is also made at the place where the acceptance is communicated; this may often be of importance in determining the law governing the validity of a contract (*Cowan v. O'Connor* (1888), 20 Q.B.D. 640), *e.g.*, where the offeror is resident in one country and the offeree in another.

(g) Acceptance of a General Offer.

The parties to the contract must be definite; but the offer need not, in the first instance, be made to an ascertained person. The offer may be general, capable of being acted upon by anyone, and in this case, of course, no contract arises until the other party is definitely ascertained by his acceptance of the offer; which acceptance may be either by words or by conduct.

In the case of *Carlill v. Carbolic Smoke Ball Co.* ((1893), 1 Q.B. (C.A.) 256), the company offered, by advertisement, to pay £100 to anyone who contracted influenza after using the ball according to directions. After Mrs. Carlill had used the smoke ball, as required by the directions, she caught influenza, and sued the company for the promised reward. The company was held liable. It was urged that a notification of acceptance should have been made to the company; but the Court held that this was one of the class of cases in which, as in the case of reward offered for information, or for the recovery of lost property, there need be no acceptance of the offer other than the performance of the condition.

A distinction must, however, be drawn between a genuine offer, capable of acceptance, and a mere statement of intention, meant simply to attract custom. In *Harris v. Nickerson* ((1873), 8 Q.B. 286)

it was held that an advertisement, by an auctioneer, that a sale of certain articles would take place on a certain day, did not bind the auctioneer to sell the goods, nor make him liable upon a contract to indemnify persons who were put to expense in order to attend the sale. This was a mere statement of intention, and not capable of acceptance. In *Warlow v. Harrison* ((1858), 1 E. & E. 295), the advertisement of a sale *without reserve* was held to create a binding contract between the auctioneer and the highest bidder that the goods should be sold to the latter. Under the Sale of Goods Act, 1893, every sale by auction is considered to be *without reserve*, unless the contrary is expressly stated (§ 58).

§ 5.—Genuineness of Consent.

The next point to be considered in the essentials of a valid contract, is the reality of the consent. It may happen that in an apparent contract, valid in all other essentials, the consent to the agreement may have been so given or obtained that it did not express the true intention of the consenting party.

This may arise from mistake, misrepresentation, fraud, duress, or undue influence.

(a) Mistake.

Mistake may be either a mistake of law or a mistake of fact.

I. MISTAKE OF LAW.

As a rule, mistake of law will not affect a contract at all. (*Ignorantia juris neminem excusat.*) Equity, however, allows some relaxation of this rule where the point involved relates more to a private right than to a general legal provision.

II. MISTAKE OF FACT.

Mistake of fact may arise in any of the following ways :—

(1) *As to identity of Parties.*

Where there is a mistake in the mind of one party as to the identity of the person with whom he is contracting, the offeror or acceptor having a definite person in his mind, with whom he intends to contract, but being, by the fraud or negligence of another, led to contract with some party unknown or unacceptable to him, the contract may be void or voidable, according to circumstances.

In *Boulton v. Jones* ((1857), 2 H. & N. 564) Jones ordered goods from Brocklehurst, and Boulton, who had taken over the business of Brocklehurst, supplied them without giving notice that the business had changed hands. Jones had a set-off against Brocklehurst, and upon learning that the goods had not come from him, he refused to pay for them; and Boulton was unable to recover, as he could not show that there was a contract with himself. Here Boulton must have known that the offer was not made to himself, and he had no right to accept it without communicating to Jones the fact that the business had changed hands.

Again, the assumption of a false name may have the effect of so misleading a person as to induce him to contract with a person with whom he would not otherwise have contracted, as in the case of *Gordon v. Street* ((1899), 2 Q.B. (C.A.) 641), where a notorious usurer, by assuming different names, induced persons to trade with him when they would not have done so had they known of his identity; or the case of *Sowler v. Potter* ((1940), 1 K.B. 271), where a woman who had been convicted of permitting disorderly conduct in a cafe, changed her name by deed poll and obtained a lease of premises for use as a restaurant from a landlord who was unaware of her true identity; in such cases the contract may be repudiated.

Where one person fraudulently represents that he is some other person so as to obtain goods which he subsequently sells, the original contract is void, and the purchaser of the goods cannot secure a good title thereto as against the deceived party (*Cundy v. Lindsay* (1878), 3 App. Cas. 459).

But where the impersonation is made with the object of obtaining credit, the contract is voidable and not void.

In *Phillips v. Brooks* ((1919), 2 K B. 243), a jeweller sold a ring to a purchaser who was allowed to take the ring without immediate payment, upon the false representation that he was Sir John Bullough. As the jeweller would have been willing to sell the ring to any other person, the fraud did not affect the actual purchase, but related to the collateral arrangement as to payment. The contract was consequently voidable, not void.

(2) *As to intention of Parties.*

If there be a mistake by one party as to the intention of the other, which is known to the other, then the contract is void. The law will not allow a man to make or accept a promise which he knows that the other party understands in a different sense to that in which he understands it himself. But where one of the parties is under a misapprehension which the other party has done nothing to induce, the contract will not be affected (*Smith v. Hughes* (1871), 6 Q.B. 597).

(3) *As to Subject-matter.*

Where the mistake is as to the quality or quantity of the subject-matter of the contract, the maxim *caveat emptor* applies, and the remedy (if any) of the injured party will be an action for the breach of such condition or warranty as may have been broken.

There are cases of genuine mutual mistake, where parties contract for a thing which has ceased to exist,

or are in error as to the identity of the subject of contract.

In *Raffles v. Wichelhaus* ((1864), 2 H. & C. 906) the defendant agreed to buy goods of the plaintiff to arrive "*ex Peerless* from Bombay." There were two ships called by this name sailing from Bombay, but Wichelhaus meant that which arrived in October, and Raffles meant that which arrived in December. Here there was no contract, because of the latent ambiguity in the terms.

The question of mistake as to the existence of the thing contracted for is dealt with in § 6 of the Sale of Goods Act, 1893, in which is embodied the decision in *Couturier v. Hastie* ((1856), 5 H.L.C. 673), and which provides that where, without the fault of either party, the subject-matter of the contract has perished before the date of the sale, the contract is void. This comes more properly under the head of impossibility of performance.

(4) *As to the Nature of a Written Document.*

When a person signs a contract in the mistaken belief that it is a document of an entirely different kind from that which it in fact is, his mind does not go with his pen and there is no contract.

Carlisle & Cumberland Banking Co. v. Bragg. ((1911), 1 K.B. 489).

Bragg was induced by fraud to sign a document guaranteeing a bank overdraft, under the mistaken impression that he was signing an insurance proposal.

Held : He was not liable, as he had made a fundamental mistake as to the nature of the document.

If a person is aware of the nature of a document, though ignorant of its contents or effect, he will be as fully liable as though he had read and understood it.

Howatson v. Webb ((1908), 1 Ch. 1).

A solicitor's clerk fraudulently induced a client to sign a mortgage by representing the document to be a deed transferring some of his property.

Held : The mortgage was binding, since the client was aware that the document dealt with his property. His mistake was simply as to its effect.

Generally speaking, a person signing a document under a mistaken impression as to its nature will not be liable even if he is negligent. There is an exception to this in the case of negotiable instruments, when negligence will impose liability.

III. EFFECT OF MISTAKE.

If the contract is still executory, the person who has entered into such a contract may repudiate it, and will be freed from all liability to the other contracting party; or if a person is induced by a mistake of fact to pay money to another, it may be recovered if the mistake be as to some fact which, if it had really existed, would have made the person paying the money actually liable to pay it.

Morgan v. Ashcroft ((1938), 1. K.B. 49).

A bookmaker through a mistake on the part of his clerk overpaid a client the amount due to him for betting winnings. On discovering the mistake the bookmaker sought to recover the amount overpaid on the grounds of mistake of fact.

Held. Since there would have been no legal liability to make the payment even had the true facts been as believed, the bookmaker was not entitled to recover.

If a payment be made under pressure of legal process, it cannot, as a rule, be recovered (*Marriott v. Hampton* (1797), 7 T.R. 269); but in this case, recovery was refused upon the ground that Marriott was unable to produce to the Court in a previous action the receipt for the sum he claimed to have previously paid, but which had since been found; the Court not allowing an action once settled to be re-opened. (*Interest reipublicae ut sit finis litium*—it is in the interest of the State that there should be some finality to litigation.)

There is an exception where there is *mala fides* on the part of the person receiving payment, and

this even where the money has been paid under compulsion of legal proceedings ; and where a plaintiff claims too little, having by mistake credited the defendant with a payment which he had in fact not made, he can subsequently claim the balance (*Ward & Co. v. Wallis* (1900), 1 Q.B. 675).

(b) Misrepresentation and Fraud. *Griff.*

Innocent misrepresentation must be distinguished from fraud, the distinction being found in the intention with which the misrepresentation was made. And again, a statement inducing a person to enter into a contract must be distinguished from a statement which is made part of the contract itself, and which is termed a condition or warranty, as the case may be. Conditions and warranties are considered later (*see* Chap. I, § 11 (c) (3) and Chap. III, § 1 (h)) ; this section deals solely with mis-statements of fact preliminary to the formation of a contract.

A person who has been induced to enter into a contract by an innocent mis-statement has no right to damages, his remedy being rescission of the contract ; even rescission will only be granted if the parties can be substantially restored to their former positions, and the application is made in good time (*Erlanger v. New Sombrero Phosphate Co.* (1878), 3 A.C. 1218). Fraudulent misrepresentation, on the other hand, further entitles the injured party to damages if he has in fact suffered loss as a result of such misrepresentation.

Fraud is defined as an untrue representation of fact made knowingly or without belief in its truth, or recklessly, careless whether it be true or false, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it to his detriment.

The whole difference between fraud and misrepresentation lies in the intention with which the mis-statement was made; in fraud there is the intention to deceive, as a result of which damages can be obtained.

There are certain contracts said to be *uberrimae fidei*, i.e., of the utmost good faith, e.g., contracts of insurance (*Seaton v. Heath* (1899), 1 Q.B., C.A. 782), contracts for the sale of land (*Flight v. Booth* (1834), 1 Bing. N.C. 370), and partnership agreements. It is essential that the parties to such a contract should disclose all material facts, and if this is not done the contract may be avoided.

Except in the case of such contracts, non-disclosure would give no right to rescind, but avoidance will be possible where the omission results in the statements which are made being rendered untrue (*Peek v. Gurney* (1873), 6 H.L. 377).

In cases of misrepresentation it should be remembered that "fraud without damage, or damage without fraud," will give no right to damages, but to this rule there is one exception, namely, that a person responsible for the issue of a prospectus containing a misrepresentation of fact may be liable to compensate a person who has taken shares on the strength of the misrepresentation, even though there was no intention to deceive (Companies Act, 1929, § 37). Another apparent exception is to be found in the rule that an agent may be liable in damages for innocently misrepresenting his authority; but this rule is based on the principle that an agent impliedly warrants that he has in fact the authority he professes, and his liability is for breach of warranty of authority (*Yonge v. Toynbee* (1910), 1 K.B. 215). (See Chap. II, § 11.)

The remedies open to a person who has been induced to enter into a contract by fraud are :—

- (1) He may affirm the contract, and sue for damages.
- (2) He may avoid the contract, with or without suing for damages.
- (3) If he has, by negligence or otherwise, lost his right to rescission, he may still retain his right to sue for damages.

The contract being voidable, not void, if third parties *bonâ fide* and for value acquire property or possessory rights in goods obtained by fraud; these rights are valid against the defrauded party (*Clough v. London & North Western Railway Co.* (1871), 7 Ex. 35).

There is an exception to this rule where the fraud is induced by impersonation of such a kind that the perpetrator of the fraud was never in possession of the goods with consent of the true owner: in such a case an innocent sub-purchaser can get no title unless he buys in "market overt." (*See Chap. III, § 2 (d.).*)

In *Cundy v. Lindsay* ((1878), 3 A.C. 459) a person named Blenkarn, by imitating the signature of a reputable firm, induced Lindsay to supply him with goods, which he afterwards sold to Cundy. It was held that an innocent purchaser could acquire no rights to the goods, because as between Lindsay and Blenkarn there was no contract (*cf. Phillips v. Brooks, ante p. 22*).

By § 24 of the Sale of Goods Act, 1893, if goods obtained by fraud, not amounting to larceny*, are sold in market overt, the property in the goods does not revert in the original owner by virtue only of the conviction of the person who fraudulently

* Larceny is theft, i.e., the fraudulent deprivation by one person of the goods of another without his consent. If one person is induced to part with his goods upon the false representation of another, they are said to have been obtained by "Larceny by a trick."

obtained them ; but if the goods have been stolen, and the thief has been prosecuted to conviction, the property in the goods does revert in the original owner.

As a general rule, a person seeking to recover damages for fraudulent misrepresentation must prove five points :—

- (1) That there was a mis-statement of fact.
- (2) That it was wilfully made.
- (3) That there was an intention to deceive.
- (4) That he was deceived.
- (5) That he suffered damage.

Where, however, an action is brought to recover damages for mis-statements in the prospectus of a company, the plaintiff is not required to prove wilful mis-statement with intent to deceive ; he has only to prove that there was a mis-statement of fact in a prospectus issued to the public generally, or to himself as an individual ; that he was misled by this, and that having acted upon it, he suffered damage. As regards the other points, the onus of proof is thrown upon the defendants, and it is not sufficient for them to prove that they did not know the statement to be false, or that there was no intention to deceive ; they will be liable unless they can show that they believed the statement to be true, and that they had good reason for so believing (Companies Act, 1948, § 43).

In one case no action can be brought for misrepresentation, even if fraudulent, unless it be in writing signed by the party to be charged ; this is in the case of a statement as to the character, conduct, credit, ability, trade, or dealings of any

person, made with the intent or purpose of enabling such person to get credit, money, or goods (Statute of Frauds Amendment Act, 1828, § 6). Here the signature of an agent is not sufficient, and therefore no action will lie against a bank for a mis-statement as to the credit of a customer signed by the manager (*Hirst v. West Riding Union Bank* (1901), 2 K.B. 560).

It has been decided that if a banker's reference is fraudulent, the manager alone who gives such reference is responsible, and not the bank, because it is outside the scope of a bank manager's authority to give a fraudulent reference.

It has also been decided that the bank manager, when replying to such an inquiry, is under no liability to make any inquiries beyond those disclosed in his books and the documents and information in his possession. He is under no obligation to seek for information outside before replying.

It is somewhat doubtful whether a banker would be liable should the manager, in replying to the enquiry, act negligently but without fraud. In *Batts Coombe Quarry Co. v. Barclays Bank* ((1931), 48 T.L.R. 4), the Court held that there was in fact no negligence in the particular case and was not therefore called upon to decide whether the bank would have been liable had negligence on the part of the manager been proved. In the course of his judgment, Avory, J., said that in his opinion there was no evidence establishing any duty on the part of the defendant bank towards the plaintiffs. He thought that the authorities showed that in such a case the only duty, if any, was a duty not to be negligent. The introduction of the words "if any" indicates that the learned judge was not prepared to admit that there was a definite duty on

the part of the bank possibly by reason of the fact that there was no contractual relationship between the customer of the inquiring bank and the bank who gave the reference.

(c) Duress and Undue Influence.

Duress and undue influence render a contract voidable at the option of the party injured.

- (1) Duress consists in actual or threatened violence, or imprisonment, against the contracting party, his wife, parent, or child. It must be inflicted or threatened by the other party to the contract, or else by one acting with his knowledge and for his advantage.
- (2) Undue influence is moral pressure. It will not be presumed unless certain relations, parental or confidential, exist between the parties; but, if these exist, then the Court will presume such influence, unless it can be shown that the donor or promisor has been placed in such a condition as would have enabled him to form an entirely free and unfettered judgment, independent altogether of any sort of control (*Allcard v. Skinner* (1887), 36 Ch. D. 145, C.A.).

The effect of undue influence will be most often seen in voluntary promises, but it may also apply where there is valuable consideration. If A., standing in a fiduciary relationship to B., makes an advantageous bargain with B., it is not enough that he should secure independent advice for B.; he must tell B. everything he knows which would be likely to affect the judgment of B. and his advisers (*Tate v. Williamson* (1866), 2 Ch. 55; *Wright v. Carter* (1903), 1 Ch. (C.A.) 27).

§ 6.—Form or Consideration.

Either form or consideration is necessary in a valid contract as evidence of the intention of the parties.

(a) Form.

By "form" is meant some solemnity attaching to the expression of agreement, as in the execution of a deed. It is sometimes stated that a deed imports consideration; by this is meant that the form alone is sufficient of itself to give effect to the contract.

The characteristics of a deed are :—

(1) Estoppel operates.

Estoppel is a rule of evidence by which, if a man has by words or conduct induced others to believe in the existence of a certain state of facts, knowing that they might or would act on such belief, he is prevented from denying the existence of such state of facts. It is of three kinds, *i.e.* :

Estoppel by record, indisputable against all parties.

Estoppel by deed, indisputable against the parties to the deed.

Estoppel *in pars*, raised by conduct, words, or writing not under seal, *e.g.*, "holding out" in partnership.

(2) It merges into itself any simple contract dealing with the same matter.**(3) Any right of action is barred at the expiration of twelve years, instead of in six years as is the case with a simple contract; but a right of action to recover rent or mortgage interest, even though payable under a deed, is barred after 6 years (Limitation Act, 1939).****(4) IT REQUIRES NO CONSIDERATION TO SUPPORT IT.**

As regards the last rule, the absence of consideration cannot be pleaded as a defence owing to the fact that

the execution of a document under seal is looked upon as a solemn act whereby the parties are precluded from denying what they have stated in the instrument ; i.e., the doctrine of estoppel operates against them. It must not be inferred that consideration is absent in the case of all contracts entered into by deed ; far from it. This form is adopted to prevent denial of other matters dealt with therein, e.g., it is essential that a vendor of an interest in land should not be able to deny his title ; but when there is no consideration intended, as in the case of a gratuitous promise, a deed must be executed to render performance possible against the promisor. Nevertheless, the Courts, in pursuance of the equitable doctrines practised by the former Court of Chancery, will refuse the remedy of specific performance in respect of a gratuitous promise even though under seal.

It was at one time thought that a deed did not require to be signed, but this doubt has been removed by the Law of Property Act, 1925, § 73, which makes signature essential.

A "bond" is a promise under seal to pay a sum of money as a penalty for the non-performance of some condition which is the real object of the bond. At Common Law the entire sum named as a penalty was held to be payable on breach of the condition, but at Equity no more could be recovered than the amount of the damage actually sustained by breach of the condition, and this is all that can now be recovered (8 and 9 William III, c. 11 ; 4 and 5 Anne, c. 16 ; 23 and 24 Vict., c. 126, § 25).

An "escrow" is a deed *delivered subject to a condition* ; as soon as the condition is fulfilled it becomes operative, and acquires the character of a deed. Thus

if a man, being in financial difficulties, agrees to a Deed of Inspectorship, and for the security of the creditors executes a Deed of Assignment of his property, and the Deed of Assignment is handed to a third party with a condition that it is only to come into operation if the Deed of Inspectorship is not complied with by him, such Deed of Assignment is an escrow until default is made under the Deed of Inspectorship.

An "INDENTURE" was at one time a deed with the edges of the paper or parchment indented, whereas a "DEED POLL" had the edges cut straight. In the former case, there being two parties, the two copies of the deed were written on the same parchment, and then divided with an indented cutting, so that the two documents could be subsequently fitted into one another. There is now no such distinction, but an indenture is executed by two or more parties, and there are two or more copies; whereas a deed poll is a unilateral deed, such as a Deed of Gift, executed by one party only.

(b) Consideration.

All simple contracts require consideration to support them. (*Ex nudo pacto non oritur actio.*) By consideration the law means VALUABLE* CONSIDERATION, which must consist of something capable of being estimated in money. In *Currie v. Misa* ((1875), 10 Ex. 162), valuable consideration was defined as "SOME RIGHT, INTEREST, PROFIT, OR BENEFIT ACCRUING TO ONE PARTY, OR SOME FORBEARANCE, DETRIMENT, LOSS, OR RESPONSIBILITY GIVEN, SUFFERED, OR UNDERTAKEN BY THE OTHER."

* Valuable, in this sense, does not mean of considerable value, but able to be valued.

Consideration is necessary to the validity of every promise not under seal. This rule was not definitely settled till 1778. In the case of *Pillans v. Van Mierop* ((1765), 3 Burr. 1663), it seems as if consideration was looked upon as being only one of the modes for supplying evidence of intention; and, therefore, that if under any Statute the contract was required to be in writing, and the writing was produced, then consideration was not necessary; but in *Rann v. Hughes* ((1778), 7 T.R. 350), the matter came before the House of Lords, and it was decided that where "contracts are merely written and not specialties, they are parol, and a consideration must be proved."

But where there is a promise of a gratuitous service, it will involve the use of ordinary care and skill in performance by the promisor; though it is not enforceable as a promise. Thus, where A. employs B. to render services for him gratuitously, the promise to render the service being gratuitous could not be enforced; but when the employment is entered upon, B. will be liable, in tort, for any damage arising from the failure to use ordinary care or skill.

In *Wilkinson v. Coverdale* ((1793), 1 Esp. 75) A. asked B. to insure his house against fire. B. did so, but so carelessly that A. could not recover upon the policy when the house was burnt. B. was held liable in damages to A., though if he had not acted at all, A. would have had no remedy against him.

Bills of exchange may be enforced in some cases, even though the acceptor has received no consideration for his promise, and though the holder has given nothing for the bill. A. draws a bill upon B. payable, to himself or order. B. accepts it, receiving no value. A. indorses it to E. for value, and E. indorses it to D. without consideration. Following the case of

Milnes v. Dawson ((1850), 5 Exch. 950), it appears that D., who has given nothing, may sue B., who has received nothing. (See also Bills of Exchange Act, 1882, § 27 (2).) This does not mean that in the case of bills of exchange, consideration is unnecessary, but in view of the circumstances in which the use of bills was developed among the mercantile community, the consideration for which the bill was given need not appear on the face of it. It is presumed to exist, and its absence can be pleaded as a defence by a party who should have, but has not received it, as against the party who should have given it, *e.g.*, as between the acceptor and the drawer of an accommodation bill.

So long as the consideration is of value it is not necessary that it should be adequate; this is a matter for the parties themselves when entering into the contract. Everyone is free to make whatever bargain he pleases and, unless there is some attendant factor which would enable rescission to be obtained, the Courts will not interfere. If fraud be alleged, however, or if the contract is in *restraint of trade*, the Courts will consider the adequacy of the consideration, in the event of litigation on the contract.

In *Haigh v. Brooks* ((1839), 10 A. & E. 309), the consideration was the surrender of a certain document which turned out to be worthless; yet the contract was held to be binding, for the consideration consisted of parting with something which might have been retained, and which the other party wished to obtain.

The consideration must be of some value in the sight of the law. This excludes consideration which consists only of natural love and affection, or which rests upon a moral as distinct from a legal obligation.

(*Beaumont v. Reeve* (1846), 8 Q.B. 483). The promisor would be actuated in such instances by some motive which induced him to make the promise rather than the receipt of some benefit. Some writers have applied the term "good consideration" to such cases, but it is suggested that this expression is far from satisfactory as tending to lead to confusion with "valuable consideration" which alone would be recognised as supporting a contract.

No stranger to the consideration can take advantage of a contract, though made for his benefit; the consideration must move from the promisee. If A. makes a promise to B., the consideration for which is a benefit to be conferred on C. by B., this cannot confer a right of action on C.; only A. could sue if B. failed to perform his undertaking.

Thus in *Tweddle v. Atkinson* ((1861), 1 B. & S. 393) the respective fathers of a husband and wife each agreed to pay a certain sum of money to the husband, and they made it a term of the contract that the husband should have the right to sue for the money. In an action by the husband, it was held that he was not entitled to recover as he was a stranger to the contract.

This follows from the general rule that only those between whom there is privity of contract can incur liability, or acquire rights under the contract (*Price v. Easton* (1833), 4 B. & Ad. 433).

There is an apparent exception to this rule where a promise amounts to the creation of a trust which will be enforced by the Courts at the instance of the beneficiaries. Although they are not parties to the contract, they are deemed to have an "equitable" interest therein.

The consideration must be of ascertainable value, and must not be physically or legally impossible.

If the consideration be forbearance to exercise a right of action, it is sometimes difficult to determine whether or not it is real. If a right of action exists, forbearance to exercise it has been held to be sufficient consideration for an assignment of documents of title to goods (*Leask v. Scott* (1877), 2 Q.B.D. 376). The compromise of a suit is based upon the same consideration. A man may not have a cause of action, but may think he has one, and be determined to enforce it. If he waives the right of action, which he really thinks he possesses, it is consideration for a compromise.

IF A MAN IS ALREADY LEGALLY BOUND TO DO THAT WHICH HE PROMISES TO DO, THEN HIS DOING IT IS NO CONSIDERATION.

V. owed a company £208. He alleged that the company, through its solicitor, had verbally agreed with him that if he paid that sum into a bank at Eastbourne by a certain date, a bankruptcy notice which had been issued would not be served. The money was duly deposited and the solicitors notified of the fact. Notwithstanding this, the bankruptcy notice was served on V. in the presence of two of his business associates. In an action by V. for damages for breach of the agreement, the Court of First Instance decided in his favour, but on appeal, the Court of Appeal took the view that as V was under obligation to pay the £208 in any event, the agreement was *nudum pactum*, and no action for breach could be founded (*Vanbergen v. St. Edmunds Properties, Ltd.* (1933), 2 K.B. 223—C.A.)

The payment of a smaller sum, in satisfaction of a larger, is not a good discharge of a debt, for it is doing no more than a man is already legally bound to do; nor is it consideration for a promise by the other party to forgive the balance of the debt. There must be something in the new contract which did not exist in the old in order to support the promise. Should A., owing B. £50, give him £45 in cash, and take a receipt in full, there is nothing to prevent B. suing him for the balance, in spite of the receipt; it is a question of fact whether he has received the

whole amount due or not. A recent decision (*Central London Property Trust, v. Hightrees House, Ltd.* (1946), 175 L.T.R. 332) laid down that in certain circumstances the payment of a lesser sum can be a good discharge of an obligation to pay a greater sum, but it is thought that this decision is contrary to authority and cannot be supported.

If B., by agreement, took A.'s acceptance on a bill of exchange for £45, and gave him a receipt in full, then, the bill being duly honoured, B. could not sue for the balance, for the bill is a negotiable instrument, and the fresh consideration consists in the new right of action on the instrument (*Foakes v. Beer* (1884), 9 A.C. 605). It is true that, in the case of *Cumber v. Wane* ((1718), 1 Sm. L.C. 325), the giving of a promissory note for £5 was held no satisfaction of a debt of £15; but at the date of that decision a promissory note was not deemed to be a negotiable instrument.

Whilst a cheque is a negotiable instrument and its receipt by a creditor would confer, if and when necessary, an additional right of action, it may be open to doubt whether the giving of a cheque for a sum smaller than that due, would be regarded as being in full satisfaction, since at the present day cheques form the customary mode of payment and the additional right mentioned would in any event reside in the recipient (but see *Day v. McLea*, *infra*).

If, however, a cheque for a smaller sum is given to the creditor by a third party, the creditor may only keep it on the terms on which it was sent and therefore, if such terms were that it was in full settlement, the debtor will be released if the cheque is accepted and honoured (*Hirachand Punamchand v. Temple* (1911), 2 K.B. 330—C.A.).

In the case of an arrangement with creditors, the consideration to each creditor for his promise to accept the composition is the promise of the other creditors to assent thereto and be bound by the scheme (*Good v. Cheeseman* (1831), 2 B. & Ad. 328).

The consideration must be legal, must not be of an immoral nature, nor contrary to public policy, the maxim being *ex turpi causa non oritur actio* (an action does not arise from a base cause). This is more fully dealt with under the head of the legality of the object. (See § 8.)

A past consideration will not support a subsequent promise unless the two factors are so interlocked that the promise subsequently given is the direct consequence of the act done or service rendered, which must have been at the request of the promisor.

Thus in *Lampleigh v. Brathwait* ((1616), Hobart, 105), as will be noted, a somewhat old case, B. committed a murder and asked L. to use his influence to secure a pardon. This necessitated expense on L's. part, and B. sometime after the pardon had been secured promised to pay him £100, which promise B. did not fulfil. L. was able to claim payment since B. had requested him to perform the service he had rendered, which could therefore not be regarded as a purely voluntary act on L.'s part. If L. had offered to attempt to secure the pardon, the decision would doubtless have been different.

Another important case on this point is *Wilkinson v. Oliveira* ((1835), 1 Bing. N.C. 490), in which the plaintiff, at the defendant's request, gave him a letter for the purpose of legal proceedings, and the defendant thereby obtained a large sum of money. Subsequently he promised the plaintiff £1,000, which the plaintiff was able to recover. The defendant's request for the letter was, in fact, an offer that, if the plaintiff would give it to him he would pay a sum to be afterwards fixed.

From this it seems that where a request is made which is substantially an offer of a promise upon terms to be afterwards determined, and services are given in pursuance of such request, a promise

to pay what the service is worth may be inferred, and any subsequent promise amounts to fixing the worth of the service.

Again, a person is held capable of reviving by subsequent promise an agreement by which he has benefited, although, for some reason or other, the agreement may be no longer enforceable. An instance of this is the revival of a debt barred by the Statute of Limitations, by means of a subsequent promise in writing to pay it.

Strictly, this is not, however, an exception to the general doctrine of past consideration, since an action to recover the debt is based on the *original* contract and not on the subsequent acknowledgment. It is true the acknowledgment enables an action for enforcement (which had lapsed) to be brought, but such acknowledgment is really given without consideration at all.

(c) Contracts which must be in writing.

Certain simple contracts cannot be enforced, unless they are in writing ; but in some instances this writing is not, in itself, vital to the contract, but is merely evidence of its existence. Such are contracts within the Statute of Frauds, and the Sale of Goods Act.

Other contracts have no validity at all unless they are in writing. These are—

Bills of exchange and promissory notes (Bills of Exchange Act, 1882, §§ 3, 83).

Assignments of copyrights (Copyright Act, 1911, § 5).

Contracts of marine insurance (Marine Insurance Act, 1906, § 22).

The acceptance or transfer of shares in a company (Companies Act, 1948, § 73, Table A, § 22).

The acknowledgement of a debt barred by the Statute of Limitations (Limitation Act, 1939), although this is not strictly a contract. It is rather a means of enforcing a remedy under an existing contract.

(d) Contracts which must be entered into by Deed.

The following contracts are not binding unless made by deed :—

A gratuitous promise (*Shubrick v. Salmond*, 3 Burr. 1639; *Rann v. Hughes* (1778), 7 T.R. 350).

Contracts made by a corporation (*Mayor of Ludlow v. Charlton* (1840), 6 M. & W. 815), with the exception of those of daily necessary occurrence (*Nicholson v. Bradfield Union* (1866) 1 Q.B. 620).

A transfer of shares in companies under the Companies Clauses Act, 1845 (§ 14).

A transfer of a British ship or any share therein (Merchant Shipping Act, 1894, § 24).

A conditional bill of sale (Bills of Sale Act, 1882, § 9). (See Chap. X, § 3, as to bills of sale.)

A legal mortgage of an interest in land.

A lease of lands, tenements, or hereditaments for more than three years (Statute of Frauds, §§ 1 and 2; Real Property Amendment Act, 1845, § 3).

A limited company under the Companies Act, 1948, although actually a corporation, may make contracts in the same manner as ordinary persons; i.e., such companies are only bound to signify assent under seal where the contract is of such a nature as to require sealing and delivery, and in any other case

the signature or verbal agreement may be given by any person acting under the authority of the company (Companies Act, 1948, § 32).

(e) **Contracts under § 4 of the Statute of Frauds.**

(1) *The Memorandum.*

By § 4 of the Statute of Frauds, 1677 (29 Car. II, cap. 3), no action can be brought on the following matters unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party to be charged, or some other person lawfully authorised by him:—

- (1) A promise of an executor to answer damages out of his own estate ;
- (2) A promise to answer for the debt, default, or miscarriage of another ;
- (3) Any agreement in consideration of marriage :
- (4) Any contract for the sale of lands, tenements, or hereditaments, or any interest in them (this clause is repealed by the Law of Property Act, 1925, and re-enacted in an amended form in § 40 of that Act) ;
- (5) Any agreement not to be performed in one year.

Non-compliance with the provisions of the Statute does not invalidate the contract, but no action can be brought until the omission is made good. The note in writing may be made at any time between the formation of the contract and the commencement of an action, but not after the action has commenced.

The rule requiring writing is a rule of evidence, and it will therefore prevail in any action brought in the

English Courts, even if the proper law of the contract is foreign (*Leraux v. Brown* (1852), 12 C.B. 501).

The memorandum must contain the names of the parties, and the subject-matter of the contract (*Champion v. Plummer* (1805), 1 N.R. 252). Where one of the parties is described merely, parol evidence will be allowed for the identification of the specific person indicated (*Sale v. Lambert* (1874), 18 Eq. 1). The memorandum may consist of various documents, so long as they are connected. Where documents refer to other documents, they may be connected by parol evidence (*Cave v. Hastings* (1881), 7 Q.B.D. 125). All the terms of the contract must, however, appear in the writing; and parol evidence cannot be admitted of terms not appearing in the writing (*Greaves v. Ashlin* (1813), 3 Camp. 426).

In *Buxton v. Rust* ((1872), 7 Exch. 1 and 279), one of the parties to a contract, who had not signed it, acknowledged it in a letter, which supplied his signature and contained at the same time an announcement of his intention to repudiate the contract. He thus supplied the statutory evidence, and as the contract had already been made, his repudiation was useless.

In *Pearce v. Gardner* ((1897), 1 Q.B. 688), it was decided that an envelope and the letter enclosed in it are so connected together that they may be taken as one document for the purpose of supplying a memorandum or note. The omission of the plaintiff's name in a letter written and signed by the defendant was, therefore, not fatal, such omission being made good by the name on the envelope.

The consideration must appear in the writing as well as the terms of the promise (*Wain v. Warlters*

(1804), 5 East 10). There is one exception to this rule, established by § 3 of the Mercantile Law Amendment Act, 1856, in the case of a promise to answer for the debt, default, or miscarriage of another.

The memorandum must be signed by the party to be charged, or his agent. It is not necessary to have the signature of both parties to make the contract enforceable (*Reuss v. Picksley* (1866), 1 Ex. 342). The signature need not be written in ink; it may be in pencil, or may be printed or stamped, or it may consist of a mark; but the intention of the person giving it must be to regard it as a signature recognising the whole contract (*Baker v. Dening* (1838), 8 A. & E. 94).

The signature must be so placed upon the document that it governs the whole of it; but it need not necessarily be placed at the end of it (*Caton v. Caton* (1867), 2 H.L. 127).

An auctioneer, before sale, is an agent for the vendor only; but upon completion of the sale—i.e., after the fall of the hammer—he becomes agent for the purchaser, and can sign any document necessary to satisfy the statute. His authority to do so cannot be revoked after the hammer has fallen (*Van Praagh v. Everidge* (1902), 2 Ch. 266).

The absence of a written memorandum will not be fatal to the enforcement of the contract, if the contract be of such a nature that the Court could have decreed specific performance if it had been in writing, and there has been a part performance, under the contract, and with a view to it, by one party to the knowledge, and with the consent of, the other.

Thus (*McManus v. Cooke* (1887), 35 Ch. D. 697), A. and B. verbally agreed for the purchase of a plot of land by A. from B. B. was to build a house on the land to certain specifications. The house was duly built; and A., while it was building, inspected it on various occasions, and made suggestions which were carried out by B. A. finally refused to carry out his contract, and pleaded that it was a contract referring to an interest in land, and that there was no written memorandum referring to the contract. It was held that this was a case where the Court could have decreed specific performance, and that there had been part performance by B. to the knowledge and with the consent of A., and that therefore the contract could be enforced.

(2) *Nature of the Contracts.*

It is essential to understand clearly the nature of the contracts referred to by § 4 of the Statute of Frauds, since it is the special character of such contracts which renders the written memorandum necessary. The promise of an executor to answer damages out of his own estate does not call for any comment, nor does the contract concerning lands, tenements, hereditaments, or any interest therein; but as regards the promise to answer for the debt, default, or miscarriage of another, it is only important that the contract should be in writing if it is a guarantee—an indemnity need not be so evidenced (*see* Chap. V, § 3).

Thus in *Boston v. Boston* ((1904), 1 K.B. 124 C.A.) a wife asked her husband to purchase a certain house, promising to pay for it out of her separate estate. The husband entered into a contract to purchase, but the wife refused to find the money, and when sued by the husband, pleaded the statute. It was held that this was a promise of indemnity by the wife, in consideration of the husband incurring liability at her request, and that the statute did not apply.

An agreement in consideration of marriage does not refer to a mere promise to marry; but to such contracts as marriage settlements. Also the mere fact that an agreement is something to do with a contemplated marriage is not sufficient to bring it

within the statute. It must be a contract in respect of which marriage forms the consideration to the promisor.

Although the statute applies if the contract is not to be completed within one year, it does not apply to a contract which may be carried out within that period, unless it is clear from the terms of the contract that it is intended to delay the performance beyond one year (*Peter v. Compton* (1693), 1 Sm. L.C. (11th Ed.) 316). Even if the contract is to be performed within the year by only one party, it is unnecessary that the contract should be evidenced by writing (*Cherry v. Hemming* (1849), 4 Ex. Ch. 631).

If a contract for services for one year is entered into, the period of service to commence on the day following that on which the contract is made, it is capable of being enforced without a memorandum, since the term of service expires on the same day of the following year as that upon which the agreement was made (*Smith v. Gold Coast Explorers* (1903), 1 K.B. 285). It is otherwise where the contract is entered into on a Saturday, to commence the following Monday (*Cayme v. Allan, Jones & Co.* (1919), 35 T.L.R. 453 D). Even though the contract of service is unenforceable through absence of the necessary memorandum, a person suing for work and labour done can recover to that extent on the implied promise to pay a reasonable remuneration (*Scott v. Pattison* (1923), T.L.R. 557), but he would not be able to recover damages for the breach.

In *Reeve v. Jennings* ((1910), 2 K.B. 522) a servant was bound by a written agreement to assist a dairyman, upon terms which included a restraint of trade within a four-mile radius for three years after leaving the dairyman's service. The servant was discharged, and subsequently re-engaged

verbally upon the same terms. When, eventually, the servant did leave, four years after the first discharge, he started business immediately on his own account within the prescribed area. As the second agreement was not in writing, and the contract was not intended to be performed within a year, it was unenforceable, and the servant could not be restrained from so carrying on business.

(f) Contracts under § 4 of the Sale of Goods Act, 1893.

By § 4 of the Sale of Goods Act, 1893, it is enacted that no contract for the sale of goods of the value of £10, or upwards, shall be enforceable by action unless, *inter alia*, some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf. This section applies not only to actual contracts of sale, but also to agreements to sell (*see* Chap. III, § 1 (d)).

As regards the form of the memorandum, when the same is necessary, the rules applicable to § 4 of the Statute of Frauds apply. The consideration need not in this case appear in writing unless the price is fixed by the parties. The section does not apply to choses in action of any kind, and therefore shares in companies are outside it.

(g) Contracts under § 6 of the Moneylenders Act, 1927.

No contract for the repayment of money borrowed from a moneylender* or interest thereon, and no security given in respect thereof, is enforceable unless a note or memorandum in writing thereof is made and signed personally by the borrower, and a copy thereof must be delivered to or sent to the borrower within seven days of the making of the contract. If it is proved that the note or memorandum was not signed by the borrower before the money was lent or the

*For a definition of a moneylender, *see* page 66.

security was given, the contract cannot be enforced. Such note or Memorandum must contain all the terms of the contract, and in particular—

- (1) The date on which the loan was made. (If an incorrect date is inserted the contract is unenforceable even though no one is deceived, and a surety would be discharged from his liability (*Gaskell Ltd. v. Askwith* (1929), 167 L.T. 376).)
- (2) The amount of the principal; and
- (3) Either the rate per cent. per annum of interest charged, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule of the Act (§ 6).

If a contract is unenforceable through failure to comply with these provisions, a borrower is entitled to delivery up of securities without having to repay the money owing (*Cohen v. Lester, J., Ltd.* (1939), 1 K.B. 504).

§ 7.—Capacity to Contract.

Certain parties are by law incapable, wholly or in part, of binding themselves by a promise, or enforcing a promise made to them.

(a) Political or Professional Status.

(1) *Alien Enemies.*

The test of a person being an alien enemy is not his nationality, but the place in which he resides or carries on business, and that a person voluntarily resident, or who is carrying on business in an enemy's country (*Porter v. Frendenberg* (1915), 1 K.B. 857) or in enemy-occupied territory (*v/o Sovracht v. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij* (1943), A.C.

203), is an alien enemy, provided that the contract is of a kind calculated to assist the enemy (*Boissevain v. Weil* (1948), 1 All E.R. 893).

Subject to the exception hereafter noted, contracts made with an alien enemy are suspended during the continuance of hostilities. The rights under them are not annulled, but revive and can be enforced upon the conclusion of peace. This rule of law is subject to the exception that if the continuance of the contract is contrary to public policy, the contract is dissolved *in toto*—an exception so important that the majority of cases which arise fall within the ambit of the exception rather than within that of the rule itself.

The question was judicially considered in a number of important cases during the Great War, and the principle was evolved that if the continuance of the contract involved intercourse with or assistance to the enemy, or was detrimental to the interests of this country, the contract was dissolved.

Thus in *Zinc Corporation v. Hirsch* ((1916), 1 K.B. 541 C.A.) the plaintiff company had agreed to sell to the defendants, who were alien enemies, the whole of the plaintiff's production of zinc concentrates at their mine in Australia, for a period of ten years from 1910, and the plaintiffs had further agreed not to sell their produce to any other persons during this period. It was held that whether or not the continuance of the contract involved intercourse with the enemy, the effect of the contract was to prevent the plaintiffs from using their resources for the benefit of this country, and therefore the contract was dissolved.

Likewise in *Ertel Biekr v. Rio Tinto* ((1918), A.C. 260), a contract entered into by an English company before the War to sell large quantities of copper ore to German companies was declared to be dissolved by the outbreak of war, in spite of a clause in the contract suspending its operation during the continuance of hostilities.

On the other hand, in *Tingley v. Muller* ((1917), 2 Ch. 144 C.A.) it was held that an irrevocable power of attorney to sell land was not avoided by the donor of the power subsequently becoming an alien enemy, and therefore a person who had agreed to buy the land was not absolved from his contract.

During hostilities contracts cannot be entered into with alien enemies without a licence from the Crown (*The Hoop* (1799), 1 C. Rob. 196).

(2) *Foreign States and Sovereigns, and their Representatives.*

Foreign States and Sovereigns, and their Representatives are not subject to the jurisdiction of the Courts of this country, unless they choose to submit themselves to it. They can enforce their contracts, but the contracts cannot be enforced against them, unless they choose. An instance of this rule is afforded by the case of *Miguel v. Sultan of Johore* ((1894), 1 Q.B., C.A. 149), where the defendant, in an action for breach of promise, successfully claimed that as an independent Sovereign he was not within the jurisdiction of the Court.

(3) *Convicts.*

A person convicted of treason or felony cannot, during the continuance of his conviction, make a valid contract, nor enforce those made previous to conviction; though such may be enforced by an administrator appointed by the Crown (Felony Act, 1870, §§ 8-10).

(4) *Barristers and Physicians.*

A barrister cannot sue for fees due to him for services rendered in the ordinary course of his pro-

fessional duties. Formerly, the law in the case of physicians was much the same, but under the Medical Act of 1886 physicians can sue, subject to the right of any College of Physicians to forbid its own members to do so.

(b) Infancy.

Contracts with an infant may be classified as (1) continuous, and (2) non-continuous.

(1) Continuous Contracts.

Such contracts would include relationships arising out of—

- (a) membership of a limited company ;
- (b) membership of a firm ;
- (c) marriage settlements ;
- (d) tenancy agreements ;

and an infant remains liable thereon unless he expressly repudiates the contract during infancy or upon attaining his majority. In the latter case, repudiation must take place within a reasonable time, and he will be deemed to have affirmed the contract if he does any act in relation thereto after coming of age ; rescission is not then possible.

There is nothing illegal in an infant holding shares in a company (*Lumsden's Case* (1868), 4 Ch. 31), but an allotment or transfer should not be effected especially where the shares are not fully paid up, since the infant can repudiate his membership either during his minority or within a reasonable time after arriving at full age. Although the contract can be rescinded, the money paid to the company by the infant cannot be recovered unless there has been a total failure of consideration, *i.e.*, the shares were valueless

during the time that they were held. The fact that no dividends were paid will not be sufficient proof of absence of value (*Steinberg v. Scala (Leeds), Ltd.* (1923), 2 Ch. 452 C.A.).

An infant may also be a partner and whilst, during his minority, he cannot be sued for the firm's debts, he is bound by the partnership accounts as between himself and his co-partners. If he repudiates his membership upon coming of age, he is only entitled to his share of the partnership fund as then ascertained. In the absence of rescission, he will be regarded as a partner in the ordinary way and will be liable for debts accruing after attaining his majority (*Goode v. Harrison* (1821), 5 B. & Ald. 159).

Contracts of service and apprenticeship are in a somewhat different category for they are enforceable against an infant and cannot be repudiated by him unless it is shown that it is for his benefit that they be discontinued (*Roberts v. Gray* (1913), 29 T.L.R. 149; *Waterman v. Fryer* (1922), 1 K.B. 499). The reason for the distinction is probably that such types of contract are commonly entered into with persons who are minors, and are regarded, in the absence of contrary evidence, as being for their benefit. But where there are onerous stipulations, e.g., provisions involving undue restraint of trade, the Court may grant relief in this direction whilst permitting the remainder of the contract to stand (*Bromley v. Smith* (1909), 2 K.B. 235).

Whilst at common law a lease granted to an infant was voidable at his option, Section 1 (6) of the Law of Property Act, 1925, now provides that an infant is not capable of acquiring or holding any legal interest in land. He can still, however, enter into a

tenancy agreement, which he would have the power to avoid in like manner to other forms of continuous contracts, but by analogy to his former obligations with regard to leases, he would be liable for rent accrued during his occupation (*Blake v. Concannon* (1870), 4 Ir. Rep. C.L. 320), and similarly for rent accrued after he had attained his majority and avoided the agreement within a reasonable time thereafter (*Kirton v. Elliott*, Rolle, Abr. 1, 731 K.).

Where an infant carries on a trade, he cannot be sued on contracts made by him during his minority (*Cowern v. Nield* (1912), 2 K.B. 419); and should bankruptcy proceedings be taken against him in ignorance of the fact that he is not of full age, the adjudication order must be annulled (*Re L.A. and B.F.M.* (1926), 161 L.T. 109).

(2) *Non-continuous Contracts.*

In the case of contracts involving isolated transactions, the infant, at Common Law, was not bound, except in respect of necessities, unless he expressly ratified them on coming of age.

It is to this class of contracts that the Infants' Relief Act, 1874, applies, wherein it is provided:—

That all contracts, whether by specialty or by simple contract, entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants shall be **ABSOLUTELY VOID** (§ 1); and

That no action shall be brought wherewith to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age (§ 2).

It may be said that this Act had two effects; it made certain contracts of an infant absolutely void, and

as regards non-continuous contracts previously voidable, it prevented the infant ratifying them after coming of age, so as to form ground for an action. It did not, however, affect his position as regards continuous contracts, which still require to be disclaimed on coming of age if he wishes to escape liability under them.

It is, therefore, now impossible for an infant to be bound by a ratification of non-continuous contracts made during infancy. Even a judgment cannot ratify. In *ex parte Kibble* ((1875), L.R. 10 Ch. 373), where an infant was adjudicated bankrupt after a bankruptcy notice issued on a judgment, the Court of Appeal in Bankruptcy annulled the judgment, on the ground that the contract was void, and incapable of being ratified even by a judgment.

Where a contract with an infant has been wholly or partly performed, and he has paid any money in regard thereto, he will be precluded from bringing an action for the recovery of the amount paid, for according to a legal maxim, "what ought never to have been done at all, if it has been done, may be valid" (*Valentini v. Canali* (1889), 24 Q.B.D. 166). The facts in this case were that an infant had rented a house and had purchased certain furniture already in it, for which he had partly paid. He entered into occupation, but subsequently repudiated the contract. It was held that although he was entitled to rescind, he could not recover the amount paid for the furniture in view of his use and enjoyment of the goods during his occupation of the premises.

This doctrine was emphasised in the case of *Pearce v. Brain* ((1929), 141 L.T. 264). An infant exchanged a motor-cycle with sidecar for a two seater motor car, but owing to defects in the car, brought an action to have the transaction set aside as

being void under the Infants' Relief Act, 1874. The Court decided that as the infant had used the car and enjoyed the benefit of the contract, the transaction could not be set aside, and the motor-cycle restored to him.

Since an infant is therefore only liable, apart from the exceptional instances above-mentioned, upon contracts for necessities, it is essential to consider what contracts fall within this description. In *Peters v. Fleming* ((1840), 9 L.J. Ex. 81), Parke, B. said :

"The true rule I take to be this, that all such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for anyone ; and for such matters, therefore, an infant cannot be made responsible. But if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party in order to support himself properly in the degree, state and station of life in which he moved ; if they were, for such articles the infant may be responsible."

By the Sale of Goods Act, 1893, § 2, the necessities of an infant are defined as such goods as are *suitable to his condition in life*, and to his *actual requirements* at the time of the sale of the goods. Although most of the decided cases have related to a sale of goods, the term "necessaries" is not restricted to such transactions, but would cover work done or services rendered.

The Court will consider in the first place whether the goods or services may be regarded as necessities in any circumstances ; if it decides in the affirmative, the jury will then be called upon to decide whether the goods or services constitute necessities in the particular case, for it is the station in life of the infant that has to be considered, and what would be necessities in one case, would not be in another.

The following have been held to be necessities in the respective circumstances :—

A racing bicycle (*Olyde Cycle Co. v. Hargreaves* (1898), 78 L.T. 296).

A servant's livery (*Hands v. Slaney* (1799), 8 T.R. 578).

Horse exercise, when ordered by a doctor (*Hart v. Prater* (1837), 1 Jur. 623).

Instruction in a trade (*Walter v. Everard* (1891), 2 Q.B. 369).

On the other hand, the following were not necessities :—

A silver-gilt goblet (*Ryder v. Wombwell* (1868), 38 L.J. Ex. 8).

Cigars and tobacco (*Bryant v. Richardson* (1866), L.R. 3 Ex. 93). (*But this decision might now be the reverse.*)

Flying lessons for a solicitor's articled clerk (*Hamilton v. Bennett* (1930), 74 S.J. 122).

(3) *The Betting and Loans (Infants) Act, 1892.*

Under this Act, it is a punishable offence to invite an infant to borrow money or to enter into betting transactions. If an infant has contracted a loan, the contract is absolutely void and cannot be ratified upon the infant attaining his majority so as to give the other party a right of recovery, but if a new contract is made in consideration of a fresh advance, the right of recovery attaches to such advance.

Should any circular relating to transactions coming within the provisions of the Act, be sent to any person at any University, College, School, or other place of education, presumption of the infancy of such person attaches unless the sender proves that he had reasonable ground for a contrary belief.

(4) *Torts.*

An infant is always liable for his torts, unless the tort is in reality a breach of contract (*Jennings v. Rundall* (1799), 8 T.R. 335). If he falsely represents himself to be of full age, and thereby induces others to make contracts with him, he may be compelled,

if the action be brought in tort, to restore any profits so made, and to compensate the persons deceived (*Lempriere v. Lange* (1879), 12 Ch. D. 675; *ex parte Jones* (1881), 18 Ch. D. 109; *Stikeman v. Dawson*, 1 De G. & Sm. 90). If goods are obtained by fraud, and they are still in the possession of the infant, they may be followed and recovered. But if a contract is void under the Infants' Relief Act, 1874, an infant is not estopped from relying on the statute by the fact that he had made a misrepresentation as to his age (*Levine v. Brougham* (1909), 25 T.L.R. 265, C.A.; *Leslie v. Shiell* (1914), 30 T.L.R. 460), for to allow an action to lie against the infant would result in the aggrieved party being able to recover damages which were denied to him under the contract. The debts of an infant trader are within the Act and are irrecoverable, but if it can be shown that *in substance* the plaintiff's claim is a claim *ex delicto* (i.e., arising out of tort), the action is maintainable (*Cowern v. Nield* (1912), 2 K.B. 419).

Ballett v. Mingay ((1943), K.B. 281).

An infant borrowed an amplifier and a microphone, and failed to return them on demand, having lent them to a third party. There was no evidence that the contract of loan allowed the infant to part with possession of the articles lent. The plaintiff claimed damages in tort.

Held : The infant was properly sued in tort, as his action in parting with the possession of the articles was outside the terms of the contract.

(c) Lunatics.

The contracts of lunatics are voidable, but not void. If the other party was unaware of the insanity the contract will hold good. A defendant who seeks to avoid a contract on the ground of his insanity must plead and prove not merely his incapacity,

but also the plaintiff's knowledge of that fact (*Imperial Loan Co. v. Stone* (1892), 1 Q.B. 599).

A contract is capable of being made or ratified by a lunatic during a lucid interval.

(d) Drunken Persons.

If a person is completely intoxicated, so that he is incapable of understanding the effect of an agreement, any contract may be avoided provided the other person knew of the drunken person's condition (*Gore v. Gibson* (1845), 13 M. & W. 623). If he does not avoid it such contract will remain good (*Matthews v. Baxter* (1873), L.R. 8 Ex. 132).

(e) Married Women.

A married woman can contract exactly as if she were a *feme sole*, so as to bind not only separate estate of which she was possessed at the time of contracting, but also after-acquired estate.

Since the passing of the Married Women's Property Act, 1882, it is presumed that contracts entered into by a married woman, for the purpose of a separate trade or business carried on by her, are made on her own behalf and in respect of her separate property; and her husband is not responsible on any such contract entered into by her, unless it can be proved that credit was actually given to him, or that he expressly, or by implication, authorised her to pledge his credit. Unless the wife can be regarded as the agent of her husband, the latter is not liable for any debts incurred by his wife, and this protection has also been extended to actions for tort which the wife had committed and for which the husband was previously equally responsible (Law Reform (Married Women and Tortfeasers) Act, 1935, § 3).

A husband is not responsible for his deceased wife's funeral expenses if she leaves separate estate (*Rees v. Hughes* (1946), 1 K.B. 517).

Prior to 1936, property could be settled on a married woman in trust, *without power of anticipation*. The effect of this was to prevent her in any way binding or charging such property in advance. If judgment were recovered against her, such judgment would only affect the portion of the estate actually in her hands, or income already accrued due and in arrears (*Hood Barrs v. Heriot* (1896), A.C. 174; *Whitely v. Edwards* (1896), Q.B. 48).

The Law Reform (Married Women and Tortfeasors) Act, 1935, has, however, made important amendments in this connection. Whilst a restraint on anticipation contained in a settlement executed prior to the 1st January, 1936, or if executed after that date was in pursuance of an obligation imposed before that date, still remains effective, the inclusion of such a provision in any instrument executed after the date mentioned shall be void (§ 2). It is also provided that the will of a testator who dies after the 31st December, 1945, shall be deemed to have been executed after the 1st January, 1936, even if the will bore an earlier date, for the purpose of avoiding any provision for restraint contained therein.

Bankruptcy proceedings can be instituted against a married woman whether she is carrying on a trade or business, or not, and the provisions of Section 125 of the Bankruptcy Act, 1914, in this regard have been repealed.

§ 8.—Legality of the Object.

Contracts may be illegal either by statute or at Common Law.

(a) Illegality under Statute.

A statute may declare that a contract is illegal or void, and although, in either case, the contract is not enforceable as between the parties, yet the distinction is important in its effect upon collateral transactions.

If a bill of exchange or promissory note be given as security for a contract which is illegal, a holder in due course may be called upon to show that value has at some time been given and that he had no knowledge of the illegality.

If the contract be void, then it is immaterial whether the holder knew of the circumstances or not. The bill or note in this case would be deemed to have been given without consideration, and, if the holder or some prior party gave consideration, an action will lie on the bill or note.

(1) *Gaming and Wagering Contracts.*

A common instance of a contract illegal by statute is one of a gaming nature. Many attempts have been made by statute to put an end to gaming contracts.

The Gaming Act, 1835, provided that all securities given for money lost upon a gaming contract or in repayment of money lent for gaming, should be taken to have been originally given for an illegal consideration; and by § 2 it was provided that where money was actually paid to the holder of the security, such money could be recovered from the original payee.

It will be observed that these Acts only applied to gaming contracts; but by the Gaming Act, 1845, § 18, all wagers were made void. Nevertheless, the distinction between gaming and other wagers is still

important as regards collateral transactions. If a bill or note is given in respect of a gaming contract, under the Act of 1835, such security is deemed to have been given for an illegal consideration, and the holder can be called upon to show that value has been given and that he did not know of the illegality. If, however, the wager be on a subject other than gaming, although the transaction is still void, it is not tainted with illegality, and a bill or note given in payment is not given for an illegal consideration but without consideration at all ; to a holder in due course it is immaterial whether or not he knew the circumstances under which it was given.

We have already said that by § 2 of the Act of 1835, money paid to the holder of a bill or note could be recovered from the original payee. In *Dey v. Mayo* ((1920), 2 K.B. 346), it was held by the Court of Appeal that a bank who receives the note or bill for collection is a "holder" within the meaning of the Act ; and in *Sutters v. Briggs* ((1922), 1 A.C. 1) the House of Lords approved *Dey v. Mayo* and further held that the "holder" includes the original payee. Thus, in these two cases the loser who had paid by cheque was successful in claiming the money so paid from the winner who had paid the cheques into his bank in the usual way for collection. These cases drew attention to the anomalous result, that if the loser paid in cash the money could not be recovered, whereas if he paid by cheque he could recover the money from the winner, and accordingly, in July, 1922, a short Act was passed (the Gaming Act, 1922), repealing § 2 of the Gaming Act, 1835. Gambling losses paid by cheque cannot therefore now be recovered.

Contracts made upon the Stock Exchange, if there is a real intention to take or deliver the stocks dealt in, are good ; but if the agreement entered into is for differences only, even though it is colourably expressed otherwise, it is in the nature of a wager (*Universal Stock Exchange v. Strachan* (1896), A.C. 173 ; *in re Gieve* (1899), 1 Q.B. 794).

Securities lodged as cover for differences can be reclaimed by the depositor, on the ground that there was no consideration for the agreement to deposit (*Universal Stock Exchange v. Strachan, supra*).

By the Gaming Act, 1892, "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Victoria, c. 109 (Gaming Act, 1845), or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." This upset the decision in *Read v. Anderson* ((1882), 13 Q.B.D., C.A. 779), so far as gaming transactions are concerned, and therefore, if an agent pays bets for his principal, he cannot recover the amount from his employer.

In *Tatham v. Reeve* ((1893, 1 Q.B. 44), the plaintiff, at the written request of the defendant, settled his betting account for him. It was held that by virtue of the Gaming Act, 1892, he was not entitled to recover from the defendant the amount so paid ; but where a loan has been made to enable the borrower himself to discharge betting debts, this does not constitute an illegal consideration, and the loan is recoverable

(*Holmyard v. Grover*, "The Times," 15th April, 1926); (*Gibson v. Roberts* (1936), 80 S.J. 596). If, however, a third party voluntarily pays the winner, he is not entitled to claim recovery by action against the loser (*Woolf v. Freeman* (1937), 1 A.E.R. 178).

Where a loan had been made to a firm of book-makers, secured by a deed charging the assets of the partnership, recovery was possible at the suit of the lender as the money might have been required for quite legitimate purposes of the business, *e.g.*, to pay rent and salaries. It was for the borrowers to prove that the loan had been knowingly made for the purposes of betting (*Humphery v. Wilson* (1929), 167 L.T. 500).

If an agent has received bets for a principal, the money can be recovered from him.

In *De Mattos v. Benjamin* ((1894), 63 L.J. Q.B. 248) the plaintiff employed the defendant to make bets for him, which he won. The defendant, having collected the money, failed to pay it over to the plaintiff. It was held that the plaintiff was not prevented from recovering from the defendant by the Gaming Act, 1892.

Moreover, if the loser has made a fresh promise to pay on a fresh consideration, a new contract arises on which the winner may sue (*Hyams v. Stewart King* (1908), 2 K.B. 696, C.A.); followed in *Burden v. Harris* ((1937), 4 A.E.R. 559), where the promise to pay was founded on the undertaking of the winner not to report the defaulter to Tattersalls.

If a betting account has been overpaid by mistake, recovery of the excess amount is not permissible. In *Morgan v. Ashcroft* ((1937), 3 A.E.R. 92, C.A.), it was held that in order to ascertain whether an overpayment had been made, it would be necessary to take an account which could not properly be done

in the present instance since the Court would thereby be recognising transactions which were contrary to law.

Where money has been placed in the hands of a stakeholder to abide the result of a wager, the party depositing it can, even after the determination of the wager, at any time before the money has been paid over by the stakeholder, give notice to the stakeholder not to pay the amount, and can recover it (*Burge v. Ashley & Smith, Ltd.* (1900), 1 Q.B., C.A. 744)

Transactions of a gaming character abroad may not be illegal by the law of the country in which they arise, and since the law of the particular country will determine the validity of the contract, money lent for such a purpose would be recoverable even if the action is instituted in this country (*Sarby v. Fulton* (1909), 2 K.B. 208). Where a cheque has been given for this purpose, payable in England, the lender would not be entitled to sue on the cheque, for in the circumstances the English law will apply to the instrument, but he would be able to sue on the loan (*Société Anonyme des Grands Etablissements du Touquet Paris-Plage v. Baumgart* (1927), 43 T.L.R. 278).

(2) *Leeman's Act*, 1867.

Under 30 & 31 Vict., c. 29, any sale of shares in a Joint Stock Banking Company is void, unless the numbers of the shares, as shown in the register of the company, are stated in the contract. The custom of the London Stock Exchange is to ignore this provision, but such custom cannot be upheld, and if the principal was not aware of it he cannot be made liable on a contract not complying with the Act should he repudiate the contract (*Perry v. Barnett* (1885), 15 Q.B.D. 388);

but if the principal was aware of the custom, then, even though he repudiates the contract, he must indemnify his broker, who takes up the shares to avoid being declared a defaulter (*Seymour v. Bridge* (1885), 14 Q.B.D. 460).

(3) *The Sunday Observance Act, 1677.*

By § 7 of the Sunday Observance Act, 1677, no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of his ordinary calling, upon the Lord's Day, or any part thereof: and every person of the age of fourteen years offending in these matters shall forfeit five shillings. But a sale on Sunday, which is not made in the exercise of the ordinary calling of the vendor or his agent, is not void at Common Law, or by the above statute. And a contract for the sale of goods, even although it be made on a Sunday and in the exercise of the vendor's ordinary calling, is not affected by the statute, unless such contract is complete on that day; if, therefore, there be a verbal contract on a Sunday for the purchase of goods of the value of £10 or upwards, but the goods are not delivered, nor any part of the price paid, until a subsequent day, the contract is good (*Bloxsome v. Williams* (1824), 3 B. & C. 232).

From time to time enactments have been made regulating Sunday trading, but it is considered that a detailed review of this legislation is outside the scope of this book.

A bill of exchange is not invalid by reason only that it bears date on a Sunday (Bills of Exchange Act, 1882, § 13 (2)).

(4) *Registration of Business Names Act, 1916.*

Where any person or firm to which the provisions of this Act apply has failed to register thereunder, such person or firm is precluded during the period of default from bringing any action for the enforcement of any contract made in relation to the business carried on. The Court has power to grant relief where it is satisfied that the default was accidental or otherwise excusable (§ 8).

(5) *Moneylenders Acts, 1900 and 1927.*

Every person whose business is that of moneylending, or who advertises or announces himself as carrying on that business, is a moneylender within the meaning of the Moneylenders Acts, with the following exceptions :—

- (a) Pawnbrokers in respect of business carried on under the Pawnbrokers Acts ;
- (b) Friendly Societies, Building Societies, and certain other societies and bodies corporate lending money in accordance with special Acts of Parliament ;
- (c) Banks and Insurance companies ;
- (d) Persons carrying on business not having for its primary object the lending of money ;
- (e) Bodies corporate exempted by the Board of Trade.

A moneylender must not carry on business as such in any name other than his authorised name, or at any place other than his authorised address. He is required to hold a moneylender's certificate and to take out an annual excise licence. If in entering into any transaction a moneylender contravenes any of these provisions, the transaction is unlawful and any contract

which forms part of it is void through illegality. The moneylender cannot maintain any action to recover the money lent or enforce any security taken by him in the course of such transaction.

Since, however, the transaction is made illegal for the protection of borrowers, the illegality will not prevent the borrower from obtaining a declaration that the security is void, and, upon equitable terms, a return of his security. Such equitable terms may include an order for the repayment of the amount owing to the money-lender (*Lodge v. National Union Investment Co. Ltd.* (1907), 1 Ch. 300).

It is illegal to charge compound interest, or to provide for an increase in the rate or amount of interest by reason of the borrower's default, but the moneylender may charge simple interest at a rate not exceeding that chargeable under the contract in respect of any payment in arrear.

Where proceedings are taken by the moneylender for the recovery of money lent or the enforcement of any agreement of security made or taken, **THE COURT HAS POWER TO RE-OPEN THE TRANSACTION** where it is satisfied that such transaction is **HARSH AND UNCONSCIONABLE** or that the rate of interest charged is excessive. The Court will then assess the rate of interest which it considers reasonable in the circumstances, or may vary any agreement made (*Money-lenders Act, 1900, § 1*). Should the rate of interest charged by the moneylender exceed 48 per cent. per annum, the Court, in the absence of evidence to the contrary, shall presume that the rate so charged is excessive, and that the transaction is harsh and unconscionable (§ 10 (1)). In the event of interest in excess of the above-mentioned rate being charged, the

Court will not allow judgment to be signed for the full amount claimed, even if the debtor consents, for the Court has an obligation in this matter unless it is proved that the interest is not, in the circumstances, excessive (*Mills Conduit Investments, Ltd. v. Leslie and Denholm* (1931), 172 L.T. 9). The moneylender may be allowed to rebut the presumption that the rate of interest is excessive if the borrower has never raised the question nor applied to the Court for relief (*Parkfield Trust, Ltd. v. Dent, supra*); but the Court would still have the right, upon its own initiative, of re-opening the transaction.

(6) *Other Statutory Provisions.*

Under the TRUCK ACTS the wages of workmen, in the absence of agreement to the contrary, may only be paid in money; and there are also various statutory provisions regulating the sale of bread, game, intoxicating liquors, tobacco, etc.

(b) *Illegality under Common Law.*

Contracts which are illegal at Common Law are :—

- (1) Agreements to commit an indictable offence or civil wrong; e.g., to commit an assault (*Allen v. Rescous* (1687), 2 Lev. 174).
- (2) Agreements contrary to public policy; i.e.—
 - (a) Agreements injurious to the State in its international relations; e.g., a contract with an alien enemy (*Esposito v. Bowden* (1875), 7 E. & B. 763).
 - (b) Agreements injurious to the public service; e.g., the assignment of the salary of a public servant (*Wells v. Foster* (1841), 8 M. & W. 151); or that a person should

be hired for money or valuable consideration, to use his influence with the Government to procure a benefit (*Montefiore v. Menday Motor Components Co.* (1918), 34 T.L.R. 463; *Parkinson v. College of Ambulance Ltd. & Harrison* (1925), 2 K.B. 1).

(c) Agreements injurious to the public interest.

A promise by a spouse to marry a third party as and when he (or she) may be in a position to do so is void, but not where the promise has been made after a decree *nisi* has been pronounced against the promisor, the decree not yet having been made absolute (*Fender v. Mildmay* (1937), 3 A.E.R., 402—H.L.). By the making of the decree, the obligations and conditions of marriage had terminated, and the promise of marriage given to a third party does not interfere with the obligations that normally exist and is not regarded as adversely affecting the public interest.

The Courts have, on numerous occasions, given expression to the view that a person should not take a benefit under a contract where that benefit would be secured by the performance of a criminal act. Consequently, a murderer (or his estate) cannot participate in the distribution of the estate of his victim; nor is it lawful for a claim to be made under a life assurance policy where the assured has committed suicide whilst sane, and this notwithstanding that the usual "suicide clause" in the policy had ceased to operate owing to the time limit

having expired (*Beresford v. Royal Insurance Co.* (1938), 2 All E.R. 602—H.L.).

(d) Agreements to pervert the course of justice; e.g., to compound a felony for a consideration (*Williams v. Bayley* (1866), L.R. 1 H.L. 220).

(e) Agreements involving maintenance or champerty.

Maintenance is assisting either party to a lawsuit with money or otherwise when the party giving the assistance has not sufficient legal or moral interest in the lawsuit.

Champerty is maintenance given upon an agreement to share in the money or property recovered.

(f) Agreements of an immoral character; i.e., agreements for an immoral consideration, or to further an immoral purpose (*Pearce v. Brooks* (1866), 1 Ex. 213).

(g) Marriage brokerage contracts; e.g., to procure marriage either with a particular person (*Arundel v. Trevillian* (1634), Ch. Rep. 47), or generally (*Hermann v. Charlesworth* (1905), 74 L.J., K.B. 620).

(h) Agreements in general restraint of trade.

The old rule relating to contracts in restraint of trade was that though the restraint might be unlimited as to time, it must not be unlimited as to space. From the case of *Maxim-Nordenfelt Gun Company v. Nordenfelt* ((1893), 1 Ch. C.A. 630), it seems that this rule must be modified to suit modern circumstances. Nordenfelt was a maker and inventor of guns and ammunition, who sold his business to the company for a large sum of money, and agreed to cease to carry on the manufacture of guns, gun-carriages, gunpowder, ammunition, or any business

liable to compete with the company's business, for a period of twenty-five years. After some years Nordenfelt entered into business with another company dealing with guns and ammunition, and the plaintiffs obtained an injunction to restrain him. It was held that the rules as to general restraint of trade did not apply where a trader or manufacturer finds it necessary for the advantageous transfer of the goodwill of a business in which he is interested, and for the adequate protection of those who buy it, to covenant that he will retire altogether from the trade which is being disposed of, provided that the covenant is one the tendency of which is not injurious to the public.

It seems, then, that a contract not to compete in *any* trade or business is in general restraint of trade, and void; but that a contract not to compete in a particular trade or business is not a general restraint, even if the restriction be unlimited as to time and space; and that such an agreement will be upheld if not injurious to the public interest, and if, in the opinion of the Court, the restraint imposed is *necessary to give the purchaser the benefit of his bargain*. This will, of course, depend upon the circumstances of each case, but a distinction is drawn between contracts of this nature entered into between vendor and purchaser on the one hand, and master and servant on the other. In contracts between vendor and purchaser the parties are usually at arm's length, and the purchaser is in a position to protect his own interests, whereas in contracts between master and servant the master is, more often than not, able to dictate his own terms to the servant. Accordingly, the Courts are slow to interfere with the terms of a

contract entered into between vendor and purchaser, but are ever ready to prevent undue oppression in contracts of the second class.

This distinction was considered and approved by the House of Lords in the case of *Morris v. Saxelby* ((1916) 1 A.C. 688), in which it was held that an agreement by a servant that he would not be engaged in the business of his employers anywhere within the United Kingdom for a period of seven years from the termination of his employment, was unduly wide and could not be enforced.

So also a contract entered into by a film actor with the producers that he would not, after the termination of his engagement with them, use the only name by which he was professionally known, and that such name should be the property of the producers, is too wide, and is invalid (*Hepworth Manufacturing Co. v. Wernham Ryott* (1920), 36 T.L.R. 10 C.A.).

On the other hand, a restraint on the clerk of a solicitor that he will not, after leaving the service of the solicitor, act professionally for any person who is or has been within the previous five years a client of the firm, is not wider than is reasonably necessary for the protection of the firm's practice (*Lewis v. Durnford* (1908), 24 T.L.R. 64).

If an employer carries on more than one business, he cannot enforce a restraint on competition in a business other than that in which the servant was actually employed (*Leetham v. Johnstone White* (1907), 1 Ch. 322).

Contracts in restraint of trade require consideration to support them, whether they are under seal

or not (*Hitchcock v. Coker* (1837), 6 A. & E. 438); in fact, this is a class of contract where the Court will require to be satisfied of the adequacy (or at any rate, the reasonableness) of the consideration, particularly as between a vendor and a purchaser. If a person acquires the goodwill of a business, and, to reap the benefit of his bargain, requires the vendor to enter into a covenant not to carry on a similar business within a specified time or area, such protection should only be afforded where an adequate price has been paid for the goodwill.

(c) The Effect of Illegality.

The effect of illegality upon contracts is as follows :—

- (1) If the contract is divisible, the bad may be rejected and the good retained.
- (2) If the contract is indivisible, the promise is wholly void.

If the object of the contract is to perform an illegal act, the contract is void, though the parties to it may not have known that the act was illegal. If the contract can be, and is, legally performed, it will hold good (*Waugh v. Morris* (1873), 8 Q.B. 202).

Where only one party has an illegal intent, if the other party does not know of the illegal object throughout the transaction, he is entitled to recover under the contract. Where the innocent party discovers the illegal object of the contract before it is completed, he may avoid it (*Cowan v. Milbourn* (1867), 2 Ex. 230); but if having discovered the illegal purpose he allows the contract to be performed, he cannot recover on it. Knowledge of illegality by an agent is knowledge by the principal (*Apthorpe v. Neville* (1907), 23 T.L.R. 575).

Money paid on an illegal contract can be recovered if the payment was induced by fraud or duress, or if one party renounces the contract, and claims repayment before anything has been done by the other party under the contract, and with a view to it (*Taylor v. Bowers* (1876), 1 Q.B.D., C.A. 300; *Kearley v. Thomson* (1890), 24 Q.B.D. 742); but it cannot be recovered where the contract has been partly performed (*Apthorpe v. Neville* (1907), 23 T.L.R. 575), nor where both parties are *in pari delicto*,* even though the plaintiff was induced to enter into the contract by the fraud of the defendant (*Parkinson v. College of Ambulance Ltd. & Harrison* (1925), 2 K.B. 1).

In the latter case, the secretary of a charity fraudulently represented to the plaintiff that he or the charity was in a position to undertake that the plaintiff would receive a knighthood if he made a large donation to the funds of the charity. A donation was made, but the plaintiff failed to receive the honour he sought. He thereupon brought an action against the charity and the secretary to recover the money on a failure of consideration, or as damages for fraud, but it was held that he had no remedy.

§ 9.—Possibility of Performance.

A contract is void if it be impossible of performance at the date when it is entered into, but the impossibility must be complete, and not merely in relation to the capacity of the party liable to perform the act or to fulfil the promise (*Thornborrow v. Whitacre* (1706), 2 Ld. Raym. 1164).

Impossibility may arise prior to, or subsequent to the formation of the contract, and as remedies differ according to circumstances, it is considered more convenient to deal with this matter under the heading of "Discharge of the Contract." (See § 11 (d).)

* Equally at fault.

§ 10.—Transfer of Rights under the Contract.**(a) By Assignment.**

A contract cannot affect any persons but the parties to it (*Eley v. The Positive Government Security Life Assurance Co.* (1876), 1 Ex. D. C.A. 88), but parties may in certain circumstances drop out, and others take their places. This may be brought about by the voluntary act of the parties themselves, or by operation of law. It is hardly correct to say that contracts can be assigned, since the liabilities under a contract cannot be assigned except with the consent of the other party; and this is in fact the rescission, by agreement, of the old contract, and the substitution of a new one, *i.e.*, novation.

(1) At Common Law and in Equity.

Prior to 1873, the Common Law did not recognise assignments upon the principle that if a contract had been entered into between A. and B., and A. desired to transfer his rights under that contract to C., he should first obtain B's. consent. Such an arrangement would then take the form of a release by B. of A. from the contract and an acceptance of C. in his stead—*i.e.*, there would be a substituted contract.

The former Court of Chancery afforded relief from the rigidity of this rule by permitting assignments without the consent of the other party to the contract first having been obtained, but in accordance with its general practice, such an assignment was only permissible where consideration had been given by the assignee to the assignor. The motive underlying the recognition in equity of such assignments seemed to be that since the other party to the contract was under obligation to perform a duty, it was immaterial

to him who benefited from the fulfilment of the contract so long as he was completely discharged upon performance. If the right assigned was a legal right—that is, a right which would be recognised in the Courts of Common Law, *e.g.*, the right to payment of a contract debt—the assignee was obliged to sue in the name of the assignor; if equitable rights were assigned—that is, rights only recognised in a Court of Equity—the assignee could sue in his own name. In order to make the assignment effectual against the debtor, he must have received notice, and the assignee takes subject to equities, that is, subject to all defences that might have prevailed against the assignor. The rule that the assignee took subject to equities was necessary for the reason above-stated; the other party to the contract could not without his consent be deprived of any defences which he could have pleaded had an assignment not been made.

(2) *Under the Judicature Act, 1873.*

By the Judicature Act, 1873, § 25 (repealed and re-enacted by the Law of Property Act, 1925, § 136), the assignee of any debt or legal chose in action has all legal rights and remedies, but the assignee takes subject to equities; the assignment must be absolute, it must be in writing, signed by the assignor, and express notice in writing must be given to the party to be charged. The notice takes effect at the date when it is received by the debtor or person liable (*Holt v. Hetherfield Trust Ltd. and Anor.* (1942), 2 K.B. 1). If these requirements are complied with, the assignee has legal, as well as equitable remedies, and can thus sue in his own name; such requirements are more stringent than the requirements in equity, where writing is not required either for the assignment or the notice.

Most assignments would now comply with the statutory requirements. It must not be inferred that legal assignments are opposed to those permitted in equity. The one is the natural development of the other, and if an assignment were to be made verbally, it would still be operative in equity.

In *Torkington v. Magee* ((1902), 2 K.B. 427), the phrase "debt or other legal chose in action" was defined as meaning "debt or right which the Common Law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable."

The Act says nothing about consideration having to be given by the assignee, and the debtor, when sued, cannot set up as a defence the want of consideration between assignor and assignee. If the assignment is equitable only, it would appear that consideration is required between assignor and assignee.

(3) *Effect of Assignment.*

Whether an assignment is legal or equitable, notice to the debtor is necessary in order to perfect the title of the assignee, and to bind the money in the hands of the debtor. The language of the notice must be sufficiently plain to give the debtor to understand that the debt has been assigned (*James Talcott Ltd v. John Lewis & Co. Ltd. and Anor.* (1940), 3 All E.R. 592). After the debtor has received notice, he cannot safely pay the money to anyone but the assignee, nor can he plead any right of set-off which arose after he had notice. Even without notice, the assignment is binding as between the assignor and assignee. Successive assignees rank, not according to the date of the assignment, but according to the dates at which notice of the successive assignments were given to the debtor. A *bonâ fide* assignment, made even after the commission

of an act of bankruptcy, is good against the Trustee in Bankruptcy, provided that it was made before the receiving order, and before the assignee has notice of an available act of bankruptcy. Even if notice of the assignment has not been given to the debtor, the Trustee in Bankruptcy, not being a purchaser for value, and not being in any better position than the bankrupt himself, cannot get priority over the assignee by giving notice of his appointment ; but to be good against the Trustee, an assignment of book debts must, with certain exceptions, be registered in the same manner as an absolute bill of sale (Bankruptcy Act, 1914, § 43).

It does not follow that *any* contractual right is capable of assignment, whether legal or equitable. Some rights are only conferred by reason of some personal consideration, *e.g.*, A. might agree to supply goods to B. and allow him extended credit as a result of long business association ; B. would not be entitled to assign his right to receive the goods on such terms of credit which it is intended should apply to him alone. So, too, if the individual skill or other personal qualification of a party to a contract is relied upon by the other, the former is not entitled to assign his right, *e.g.*, contracts between an author and his publisher are not assignable (*Stevens v. Benning* (1855), 6 De G. M. & G. 223).

The question as to what rights can or cannot be assigned takes a practical form when a company is formed to acquire the business of a trader or firm, or becomes an assignee as a consequence of the absorption of another company.

Duties and liabilities under a contract are not in any case assignable as a matter of right. The consent of the other party to the contract must be obtained.

This is a fair provision, for the projected assignee might not be in so favourable a position as the assignor to perform the duty or to discharge the liability. There are instances in which certain duties may be delegated to an agent or servant, *e.g.*, a country solicitor may employ a London solicitor to deal with litigation in the High Court, but this is a matter of agency only ; the client is not in privity of contract with the London solicitor.

In some cases, rights and duties are so intermingled that the former cannot be transferred without affecting the latter. For example, in leases, the continuity of enjoyment, which is the main object, is dependent upon payment of ground rent, and the performance of other covenants (to repair, insure, etc.). Clauses are, therefore, frequently included in the deed, restricting the right to transfer unless the sanction of the lessor has been previously obtained.

The assignment of leases differs, however, from the assignment of other rights inasmuch as the privity between the lessor and lessee is not entirely determined ; the lessee remaining liable to the lessor during the whole of the term of the lease. Upon assignment, the assignee becomes responsible for the performance of the covenants, but should he default, recourse can be had against the lessee. The assignee indemnifies the lessee against this potential liability. Should a further assignment be effected, the second assignee assumes responsibility. Provided that the first assignee has fulfilled his obligations, he is relieved of further liability upon the occasion of a further assignment.

The question has arisen as to whether part only of a debt can be assigned, and this is a matter which

is not free from doubt. In *re Steel Wing Co.* ((1921), 1 Ch. 349), it was held that the part assignment did not conform to the provisions of § 25 (6) of the Judicature Act, 1873, but gave rights in equity whereby the assignee was able to present a petition for winding-up the company compulsorily; but in *Skipper v. Holloway* ((1910), 1 K.B. 630), the decision was to the contrary. The decision in the *Steel Wing Co.* case is now generally taken as the authoritative view. The legal position was also reviewed in *The Bank of Liverpool and Martins v. Holland* ((1926), 43 T.L.R. 29), wherein it was held that a part assignment constituted a valid legal assignment of the whole debt, in view of the conditions of the agreement, the bank being regarded as a trustee for the assignor of any amount in excess of the part of the debt assigned (£150) recovered by them from the debtor. It should be stated, however, that in the agreement, the whole of the debt due to the assignor was assigned, with the proviso that the bank should only be entitled to retain the amount due to them, not exceeding £150, so that it would appear that the possibility of a *legal* assignment of part of the debt only, still remains somewhat open to doubt.

Special rules apply to the assignment of money-lenders' debts (Moneylenders Act, 1927, §§ 16 and 17).

(4) *Policies of Life Assurance.*

By the Life Insurance Act, 1867, policies of life assurance are assignable in a form specified by the Act. Notice must be given by the assignee to the Assurance Company; and he takes subject to such defences as would have been valid against the assignor (§§ 1-3).

(5) *Policies of Marine Insurance.*

By the Marine Insurance Act, 1906, § 50, policies of marine insurance are similarly assignable, subject to any stipulation to the contrary contained in the policy, but there is no provision as to notice. The policy may be assigned even after a loss has arisen.

(b) *By Negotiability.*

Negotiability enables the contract to pass from one person to another without notice to the person liable in respect of it.

The written promise gives a right of action to the holder of the document for the time being, in his own name; the holder is, with certain exceptions, not prejudiced by defects in the title of his transferor, and does not hold subject to such defences as would be good against his transferor.

The case of *Crouch v. Crédit Foncier of England* ((1873), L.R. 8 Q.B. 374) decided that no instrument under seal can be negotiable, even though it professes to be payable to bearer; but by *Goodwin v. Roberts* ((1875), 10 Ex. 337), debentures issued by companies in England, payable to bearer, are negotiable instruments. Section 91 of the Bills of Exchange Act, 1882, also makes valid the negotiable instruments of corporations issued under seal. The characteristics of negotiable instruments are dealt with in Chap IV, *post*).

(c) *By Operation of Law.*

The benefit and liabilities of a contract may also be transferred from one person to another by operation of law. This occurs in the case of covenants running with land; in bankruptcy, by the vesting of a bankrupt's property, including his rights of action, in

the trustee ; and the transfer by death of contracts, other than those for personal services, to the legal personal representative.

A distinction must be drawn between such cases and those assignments, *provided for* by law, *e.g.*, life assurance policies. In the former case, the transfer is effected automatically without the execution of any specific assignment.

§ 11.—Discharge of the Contract.

(Contracts may be discharged by agreement, performance, breach, impossibility, or operation of law.)

(a) Discharge by Agreement.

Discharge by agreement may take place by waiver, by substituted agreement, or by condition subsequent.

(1) *Waiver.*

Waiver is an agreement between the parties that they shall no longer be bound by the contract. This agreement is subject to the ordinary rules as to consideration ; the consideration for the promise of each party generally being the giving up by the other of his rights under the contract.

If the contract is executory, and A. has done all that he was bound to do, while the time for B. to perform his promise has not yet arrived, a bare waiver by A. of his claim would not be an effectual discharge to B. ; there must be either consideration, or the waiver must be under seal (*Foster v. Dawber* (1851), 6 Ex. 839).

The waiver of a right of action on a bill of exchange is an exception to the rule that consideration is necessary for effective waiver, unless made under seal ; but the waiver must be *in writing*, or the bill must be delivered up to the acceptor (Bills of Exchange Act, 1882, § 62).

(2) *Substituted Agreement.*

A substituted agreement requires no explanation ; there must be such an alteration in the terms of the contract as to amount to an express or implied waiver. The most common form of substituted agreement is that of novation, *e.g.*, the substitution of a new debtor for an old one, with the consent of the creditor (*Hart v. Alexander* (1837), 2 M. & W. 484).

A person was indebted on a promissory note to a money-lender for a certain sum, plus interest, and his father sent to the moneylender a smaller sum than the actual amount due, asking to receive the promissory note in exchange. The moneylender cashed the draft received and then applied for the balance, stating that he did not accept the money in full settlement.

It was held that this was an offer by a third party to buy the promissory note, and the cashing of the draft amounted to an acceptance of the offer, and the debt being extinguished the promissory note ceased to be a negotiable instrument in the hands of the moneylender (*Hirachand Punamchand v. Temple* (1911), 2 K.B. C.A., 330).

(3) *Condition Subsequent.*

A condition subsequent is a provision in the contract that the fulfilment of a condition, or the occurrence of an event, shall discharge the parties from further liabilities. An illustration may be found in the "excepted risks" of a charter party ; the occurrence of such an excepted risk releases the shipowner from the strict performance of the contract, and, if it should take place while the contract is wholly executory, the parties are altogether discharged (*Geipel v. Smith* (1872), 7 Q.B. 404).

(b) *Discharge by Performance.*

(1) *Actual Performance.*

Actual performance arises where each party actually carries out his part of the contract.

(2) Payment.

A contract may be discharged by payment, where the liability of one party to the other consists in the payment of a sum of money. This payment should, primarily, be made in money, but may, *with the consent of the creditor*, be made by cheque or other negotiable instrument. In this case the payment is held to be *conditional* on the instrument being honoured, and, if dishonoured, a double right of action arises, one on the original consideration and one on the dishonoured instrument. If, however, the creditor has been offered cash, and requests a bill or cheque instead, then the payment is *absolute*, and the right of action on the original contract is lost, the only remedy being to sue on the dishonoured instrument (*Sard v. Rhodes* (1836), 1 M. & W. 153).

Payment by a third person is satisfaction of the debt, if the debtor assents to the payment. At any time before he does so, the creditor may return the money to the third party, and reserve his rights against the debtor (*Simpson v. Egginton* (1855), 10 Ex. 847; *Walter v. James* (1871), 6 Ex. 124).

(3) Legal Tender.

A debtor is bound to seek out his creditor and pay him (*Walcott v. Mascall* (1844), 13 M. & W. 451), and the payment should be offered in legal currency.

Legal tender consists of an offer of payment in accordance with the provisions of the Coinage Act, 1870, and the Currency and Bank Notes Act, 1928, i.e.—

Gold coins issued by the Mint, to any amount.

Silver, not exceeding £2.

Bronze, not exceeding 1s.

Bank of England Notes, to any amount.

To constitute a legal tender there must be—

- (a) An offer of payment in legal currency, as defined above, to the creditor or his authorised agent.
- (b) Actual production of the money unless the production is dispensed with by the creditor (*Finch v. Brook* (1834), 1 Bing. N.C. 253).
- (c) A total absence of any condition attached to the tender.
- (d) An offer of the EXACT amount of the debt; no change can be demanded (*Robinson v. Cook* (1816), 6 Taunt. 336), but the debtor can tender a sum larger than the amount of the debt in satisfaction if he has not the exact amount (*Dean v. James* (1833), 4 B and Ad. 546; *Betterbee v. Davis* (1811), 3 Camp. 70).

If after making a legal tender the debtor is subsequently sued, and the amount tendered is upheld, the creditor will be answerable for all costs of the action. The debtor upon plea of tender must, however, pay the money into Court, as the debt is, of course, not extinguished (R.S.C. Ord. 22 r. 3).

A valid tender has the effect of stopping interest running, and generally extinguishes the right of lien.

If the creditor expressly or by implication requests a remittance through the post, the payment will be deemed to have been duly made should the letter containing the remittance be lost in transit. It cannot be claimed by the debtor that the loss should be borne by the creditor, merely by reason of the fact that remittance has been made by post over a period of years; there is no implication in such a case that the creditor must be regarded as having

agreed to the practice only because he has raised no objection (*Pennington v. Crossley* (1897), 77 L.T. 43). And, too, the debtor is not protected if he remits to his creditor in an unauthorised manner, even where he has taken reasonable precaution against loss. Thus there was no payment where a sum of £48 was sent in Treasury notes and cash by registered packet, and the money was stolen after delivery upon the creditor's promises. Even though the facts pointed to the contemplation by the creditor that cash would be sent through the post, it was considered that this would only apply to small amounts and did not amount to a request for payment, through the medium of the post, in this manner (*Mitchell-Henry v. Norwich Union Life Insurance Society*, 34 T.L.R. 359, C.A.).

(4) *Appropriation of Payments.*

When a debtor makes a payment to his creditor which is insufficient to discharge the whole of the indebtedness to that creditor, it is essential that an understood basis of appropriation should exist, particularly when the total amount of the indebtedness represents a number of separate transactions, some of which may be open to dispute. Certain rules have therefore been laid down by custom and are now recognised by the Courts:—

- (a) The debtor may appropriate the payment to a particular debt or debts at the time of payment.
- (b) If the debtor does not do so, the creditor may appropriate it as he chooses.
- (c) If there is a current account, it is presumed that payments are appropriated to the debts in order of date (*Clayton's Case* (1816), 1 Mer. 585).

If the debtor appropriates at the time of payment, and the creditor does not agree with such appropriation, his only remedy is to refuse payment, and stand upon his legal rights (*Croft v. Lumley* (1858), 5 E. & B. 648). If the debtor does not appropriate, but pays the exact amount of a particular debt, it is presumed that the payment is in discharge of that debt (*Marryatts v. White* (1817), 2 Stark. 101).

The creditor may only appropriate where the debtor does not do so, and until he has informed the debtor of his appropriation he may alter it (*Simpson v. Ingham* (1823), 2 B. & C. 65); he may if he chooses apply the payment to a statute-barred debt (*Mills v. Fowkes* (1839), 5 Bing. N. C. 455).

Should a customer pay trust moneys into his banking account and subsequently withdraw money for his private use, the rule in *Clayton's Case* will not apply, and the amounts so withdrawn will be set off against the customer's own funds, irrespective of the dates upon which the deposits of the trust money had been made (*Re Hallett's Estate* (1880), 13 Ch. D. 696). If there are two or more beneficiaries under separate trust funds and the amount ultimately standing to the credit of the account is insufficient to meet all the trust obligations, the rule in *Clayton's Case* will be followed in order to ascertain to what portion of the balance the beneficiaries are respectively entitled (*Re Stenning, Wood v. Stenning* (1895), 2 Ch. 433).

(5) Receipts.

It is a somewhat doubtful point whether a person making a legal tender can demand a receipt, since he must make the tender unconditionally. Under the Stamp Act, 1891, §§ 101–103, it is the duty of the creditor to stamp a receipt if the amount paid

amounts to £2 or upwards, but there does not appear to be a direct statutory obligation to give the receipt itself in such circumstances. Few persons would refuse to give a receipt upon request, and the question consequently seldom comes before the Courts. Commercial expediency and practice dictate that a receipt should be given, and a creditor rarely stands on his strict legal rights, especially since the position is open to some doubt.

It should be observed that a receipt is not conclusive evidence that the money stated to have been paid was in fact paid, although of course it affords very strong evidence of that fact.

The following receipts are exempt from stamps :—

- (a) Receipts by bankers for moneys deposited with them.
- (b) Receipts for Parliamentary taxes or duties.
- (c) A receipt given by an officer of a public department of the State, for State moneys.
- (d) Receipts for Army and Navy pensions.
- (e) Certain receipts in bankruptcies and liquidations.
- (f) Receipts given by employees for salaries and wages.
- (g) Receipts given by charitable institutions, which do not utilise their funds for any purposes other than those of a charitable nature. Such institutions are not bound to stamp receipts for donations and subscriptions, since the Crown will not enforce penalties against them.

(6) *Interest on Debts.*

The law does not, as a rule, in the absence of agreement imply a promise to pay interest on a debt ;

but in some cases SIMPLE interest will be allowed in addition to the amount of the debt, *e.g.*, when money is due :—

- (i) On **BILLS OF EXCHANGE**, generally 5 per cent. (Bills of Exchange Act, 1882, § 57).
- (ii) On an **AWARD**, at the same rate as a judgment debt (Arbitration Act, 1934, § 11).
- (iii) To a **SURETY** who has paid the debt, generally 4 per cent. (*Pctre v. Duncombe* (1851), 20 L.J. Q.B. 242); or money due under a **CONTRACT OF INDEMNITY** (*Omnium Insurance Corporation, Ltd. v. United London & Scottish Insurance Co.* (1920), 36 T.L.R. 386).
- (iv) On a **JUDGMENT**, 4 per cent. (Judgments Act, 1838, § 17).

Interest will also be allowed where—

- (v) There is an **EXPRESS AGREEMENT** to pay interest.
- (vi) It is chargeable in accordance with a **TRADE CUSTOM** (*In re Anglesey* (1901), 2 (h. 548).
- (vii) It is awarded by a **JURY** at the current rate, on fixed sums, due and payable on a written instrument which is overdue.
- (viii) In proceedings for the recovery of any debt or damages, the Court orders the inclusion of interest in the sum for which judgment is given at such rate as it thinks fit for the whole or any part of the period between the date when the cause of action arose and the date of the judgment (Law Reform (Miscellaneous Provisions) Act, 1934, § 3). Such interest is liable to Income Tax, deductible by the debtor, who must account to the Revenue therefor (*Westminster Bank Ltd. v. Riches* (1945), Ch. 381).

(7) *Accord and Satisfaction.*

Accord and satisfaction consists in an agreement between the two parties by which, on some new consideration being given by one of the parties, the other agrees to forego his rights under the original contract. There must be both accord or agreement, and satisfaction; the satisfaction being a fresh consideration, actually executed, which may consist in the obtaining of a new right against the debtor or some third party, or the acquisition of something different from that which the debtor was, by the original contract, bound to perform.

The commonest example of the application of this principle is the allowance of a cash discount. The creditor receives his money at a date earlier than he could otherwise demand payment (having regard to the customary or agreed term of credit); and the risk, however small, of a bad debt is eliminated.

Another instance of this accord and satisfaction is found in cases where, *by agreement between the parties*, a negotiable instrument for a smaller sum is taken in settlement of a larger amount due. The mere payment of a smaller sum cannot itself be satisfaction for a larger sum due; but where some additional advantage is conferred on the creditor, as *e.g.*, the right of action on the instrument should it be dishonoured, in addition to the right of action on the original contract, such additional right will be regarded as consideration for the waiver of the claim to the difference unpaid. The question as to whether the payment of a less sum by cheque would constitute satisfaction¹ has already been referred to (*see p. 37 ante*). The mere fact that the payment of a smaller sum than that due was made by cheque, and a receipt given in full,

would not in itself prevent an action being brought for the balance, since the receipt may have been given under a mistake of fact, in which case, though there might be satisfaction, there would be no accord, and both are necessary (*Day v. McLea* (1889), 22 Q.B.D. 610).

The following are other circumstances in which the principle may be applied :—(1) Where something of a different nature, though of less value, is accepted ; (2) where there is a dispute as to the amount, and a compromise is effected ; (3) in the case of settlement of unliquidated damages* ; and (4) compromises under deeds of arrangement, and in bankruptcy.

(c) Discharge by Breach.

Breach of contract may take place in three ways. A party under a contract may renounce his liabilities under it ; he may by his own act make it impossible to fulfil them ; or he may totally or partially fail to perform what he has promised.

(1) Renunciation.

If one of the parties to a contract renounces his liabilities before the time for performance has come, the other party is discharged, if he so pleases, and may immediately sue for the breach (*Hochster v. De la Tour* (1853), 2 E. & B. 678) ; but the renunciation must relate to the whole promise (*Mersey Steel & Iron Co. v. Naylor* (1884), 9 A.C. 442).

In the latter case, the company had agreed to sell to N. a quantity of steel to be delivered in specified monthly instalments. Two instalments had been delivered when the company went into liquidation. N. refused to pay for the steel delivered, unless under an order of the Court, being under the erroneous impression that there was no one to whom

* Unliquidated damages are those which are not yet agreed or determined by decision of the Court.

payment could safely be made. It was held that the company was not entitled to repudiate the contract and refuse to deliver the other instalments, as N.'s refusal to pay in the circumstances did not amount to a repudiation of the contract.

Alternatively, the person entitled to performance may refuse to accept the renunciation and treat the contract as still existing, in which case the legal position of the parties is unaffected by such renunciation. The promisee would then hold the other party to the contract and could institute proceedings for breach if the contract were not duly performed (*Avery v. Bowden* (1855), 5 E. & B. 714).

Where one of the parties to a contract is guilty of conduct which to a reasonable man would imply an intention to repudiate the contract, an action for breach may be brought immediately, whatever the actual intention of the other party may have been (*Forsling v. Bechely-Crundall* (1922), S.C., H.L. 173).

If before the time of performance arrives one of the parties renders the contract impossible of performance, the contract may be treated as renounced by him and an action may be commenced immediately (*Lovelock v. Franklyn* (1846), 8 Q.B. 371).

In this case, F. agreed to assign a lease to L. and executed an assignment to some other person, prior to the date upon which the original assignment was to have been completed.

(2) *Failure of Performance.*

When there has been a breach of contract by failure of performance, the injured party may bring an action for such breach, but whether or not he is himself discharged from further performance of the contract depends on the nature of the contract and the nature of the breach. Where the parties are

bound to perform their respective promises simultaneously, the promises are interdependent, and a breach by one party will discharge the other. Thus in a contract for the sale of goods where payment and delivery are to take place at one and the same time, the failure by the vendor to deliver the goods will discharge the buyer from his obligation to pay for them. Where, on the other hand, the contract consists of a number of divisible promises, and there has been a partial failure of performance by one party, the other party will not always be discharged from further performance, but the question is one of degree. If the breach is so serious that it goes to the root of the whole contract, or if the act or conduct of one of the parties amounts to an intimation of an intention to abandon and altogether refuse performance of the contract, the other party will be discharged; if the breach is less serious, the injured party may claim damages, but will not be liberated from performance of his own promises. The question is one of fact, depending on the circumstances of each case. Thus where goods are to be delivered in certain instalments, a default in the quantity contained in one or more of the instalments will not discharge the injured party unless the default is so serious as to amount in fact to a total failure of consideration (*Mersey Steel & Iron Co. v. Naylor* (1884), 9 A.C. 436), *supra*.

In this connection the important distinction between conditions and warranties may be observed. A *condition* is a term of a contract which is deemed to be of the essence of the contract, and on its failure the injured party may treat the contract as DISCHARGED and may claim damages; a *warranty* is a term of a contract which does not go to the root of the contract,

Damages for a special loss, as where the purchaser loses a particular bargain by the failure of the vendor to deliver the goods at the proper time, cannot be recovered unless this has been made a term of the contract (*Horne v. Midland Railway* (1873), L.R. 8 C.P. 131), or unless the special circumstances were known to the person who has broken the contract (*Hadley v. Baxendale* (1854), 23 L.J. Ex. 179). Where damage is suffered which is not the natural and probable result of the breach, such damage is said to be too remote and cannot be recovered.

The fact that damages may be difficult of assessment will not deprive an injured party of his right, and a claim may be made not only in respect of loss already sustained but also of prospective loss if such loss was reasonably within the contemplation of the parties.

Where the damages relate to some loss expressed in a foreign currency, a conversion into sterling must be effected, and this is taken as on the date when the loss or breach occurred and not as on the date when the action is brought (*In re British American Continental Bank Ltd.* (1923), 128 L.T. 727, C.A.).

It is the duty of the injured party to minimise the loss which he has sustained. If A. agrees to sell certain goods to B. who before delivery repudiates the contract, the measure of loss for which A. could claim would be the difference between the contract price and that at which he could dispose of the goods elsewhere. If he could have resold them at a certain price but neglects to do so and disposes of them at a less price, the price at which he could have sold will be that to be taken in ascertaining the damages sustained. So too, where an employment contract is terminated by the winding-up of the company (the employers), the employee, in proving for damage suffered, must

bring into account an allowance for services which he was asked to render to the company acquiring the business of his former employers, and which offer he had, in the circumstances, refused (*Re Gramophone Records, Ltd.* (1930), 169 L.T. 193).

Damages may be "LIQUIDATED" or "UNLIQUIDATED." Liquidated damages is a sum *agreed* on by the parties to the contract as an assessment of the damage or loss consequent upon breach; all other damages are unliquidated. Such an assessment may be made where difficulty would arise in an accurate estimation of loss which might be sustained, and the inclusion of the provision in a contract is commonly found where completion is to be effected by a certain time. Demurrage is in the nature of liquidated damages, and similar clauses are usual in contracts for the erection of buildings, engineering works, etc., where the provision is for a stated sum for every day or week of delay.

Although in a contract which provides for liquidated damages the sum mentioned can be recovered, care must be taken to distinguish liquidated damages from a "PENALTY," which in this connection is a sum named in a contract to be forfeited on breach, not as an agreed valuation of the damages, but as a security for the due performance of the contract. On breach of a contract subject to a penalty clause, only the actual loss incurred as a result of the breach can be recovered, and a penalty is none the less such by being termed "liquidated damages"; if the sum mentioned is in fact in the nature of a penalty, the Court will not enforce it (*Kemble v. Farren* (1829), 6 Bing. 147).

In *Imperial Tobacco Company (Great Britain and Ireland) Ltd. v. Parslay* ((1936), 2 A.E.R. 515, C.A.), an agreement was entered into between the parties whereby the plaintiff

company undertook to supply certain brands of tobacco and cigarettes to the defendant, upon the condition that if the latter retailed the articles at a less price than that stipulated he should pay to the plaintiffs a sum of £15 in respect of each breach by way of liquidated damages. Upon a breach being committed and a claim made, it was contended by the defendant that in view of the disproportionate amount stipulated for and the difference in the price at which the articles had been sold below that provided for, the provision in the contract was of the nature of a penalty.

The Court of Appeal, however, held that the possible or probable amount of the damage must be considered, and that the amount provided for must be regarded as of the nature of liquidated damages; nor did the Court consider that the financial inequality of the parties (the defendant being a stallholder) was relevant to the decision as to whether the sum fixed was a penalty or liquidated damages.

Although in most instances the enforcement of the term of the contract is resisted on the ground of excessive provision as liquidated damages, it is also competent for the defendant to plead that the sum fixed was intended as a penalty having regard to its extreme inadequacy.

In *Widnes Foundry (1925), Ltd. v. Cellulose Acetate Silk Co., Ltd.* ((1931), 171 L.T. 459), A. agreed with B. to deliver and erect certain plant and to pay a sum of £20 a week upon default. The completion was delayed for 30 weeks, but the actual loss suffered by B. was £5,850. Although the Court of Appeal held that the sum provided for constituted liquidated damages, the Court below (whose decision was reversed) expressed the view that a sum so provided for could be regarded as a penalty by reason of its extreme inadequacy as much as by its excessiveness.

(b) SPECIFIC PERFORMANCE.

Specific performance is a decree of the Court ordering a party to carry out his part of the contract.

Such an order is made where the usual remedy of damages would not sufficiently compensate the injured party, whose rights can only be satisfied by the performance of the contract in its exact terms.

It is an "equitable" remedy as, at one time, the Common Law Courts were only empowered to award damages. Although, since the passing of the Judicature Act, 1873, all Courts may now make an order for specific performance, the following conditions observed by the former Court of Chancery are still applicable :—

- (1) There must have been consideration. The appellant went to the Court of Chancery not as a matter of right but upon a privilege afforded him, and the Court would not extend its jurisdiction to the enforcement of gratuitous promises. Nor must the consideration, if given, be merely nominal.
- (2) The contract must be fair and just.
- (3) The contract must be enforceable by either party. If the contract is one in respect of an interest in land (and such contracts were chiefly those for which a decree was originally sought), a written memorandum in compliance with § 4 of the Statute of Frauds was necessary for their enforcement. This memorandum may have been given only by the party who had defaulted, and the Court would not, in this case, decree specific performance, for if circumstances had been reversed, the party mentioned would not have been in a position to have obtained even his legal remedy. Or the remedy might be sought by an infant who would have been able to have avoided performance of his part of the contract by reason of his infancy.
- (4) The Court must be able to supervise and enforce execution. Thus contracts of personal service do not fall within the ambit of the rule.

Although essentially an equitable remedy, the principle of specific performance is now recognised by statute, for under § 52 of the Sale of Goods Act, 1893, such an order can be made in respect of specific or ascertained goods forming the subject of a contract of sale; and under the Companies Act, 1929, the production of registers, normally open to inspection, may be ordered where such production has been refused upon the request of persons entitled under the Act to inspect them. Although, in the latter instance, the right of inspection can scarcely be considered contractual, the tendency to widen the application of the doctrine of specific performance is worthy of note.

(c) INJUNCTION.

An injunction is an order of the Court restraining a party from doing an act.

It has already been stated that specific performance of a contract for personal services cannot be enforced; but in some cases an injunction may be sought when there is in the contract a negative term, express or implied, sufficiently distinct to enable the Court to enforce it by an injunction to restrain infringement of the negative term. An example of such a negative term is an agreement by an artiste to perform at a particular place *and nowhere else* during a particular period (*Lumley v. Wagner* (1852), 1 D.M. & G. 604). The injunction operates not so much as a remedy as a mitigation of injury where the defendant does not carry out the main purpose of the contract.

(d) QUANTUM MERUIT.

In some cases a person who has performed a portion of his duties under a contract, but has been unable to

complete the whole, may sue on a *quantum meruit* for the value of the work done ; but this is only possible—

- (1) where complete performance was prevented by the action of the other party ;
- (2) where the contract is divisible, and a specific portion of the remuneration can be allocated to each portion of the contract (*Mavor v. Pyne* (1825), 3 Bing. 288) ;
- (3) where the other party has retained and accepted the benefit of the part performance after the time of completion of the contract has expired.

The claim is really founded upon the implied promise to pay for the work actually done, and is supplementary to the action for damages which can be brought as a result of the breach ; for the reimbursement in regard to labour expended would not, by itself, afford complete satisfaction. Where a builder undertakes to erect a house for a lump sum and abandons the contract after partly performing the work, he has no remedy even though the other party secures a benefit by the breach. The builder is only entitled to payment on completion of the work (*Sumpter v. Hedges* (1898), 1 Q.B. 673) ; but if the other party had repudiated the contract, the builder would be entitled to sue on a *quantum meruit* and also for the loss (of profit) he had sustained from the breach.

(4) *Remedies against third party procuring breach.*

In speaking of breach of contract, it is well to notice that for one person to induce another to break a contract already entered upon, is an actionable wrong, if the object of the party inducing the breach was either to injure the person who suffers by the breach, or to obtain a benefit for himself (*Quinn v. Leatham* (1901), A.C. 495) ; but one or more members

of a Trade Union may induce a person to break a contract in contemplation of a trade dispute (Trade Disputes Act, 1906, § 3).

The underlying principle is that a contract is sacred to the parties to it, and no third party must interfere to the detriment of either of them. The leading case is *Lumley v. Gye* ((1853), 2 E. & B. 216), where A. induced B. to break her contract to sing at a particular theatre. The right of action against A. would be independent of that against B. for the breach of the contract. So, too, when A. persuaded X.'s clerk to give him a list of his master's customers, X. could claim damages and could secure an injunction forbidding A. from making use of the list (*Lowenadler v. Lee* (1924), 158 L.T. 372).

It is not actionable merely to induce a man not to enter into a contract (*Allen v. Flood* (1898), A.C. 1); but if intimidation be used, or if two or more persons combine wilfully to injure a man in his trade, a wrong is committed and damages may be obtained (*Sorrell v. Smith* (1925), A.C. 700). The subject is one of considerable difficulty and properly belongs to the law of torts.

(d) Impossibility.

If a person undertakes to perform an act which is obviously impossible, *e.g.* (to employ a Roman Law simile), "If I touch the sky with my finger," there can be no contract. But to excuse performance, the act must be *generally* impossible, and not merely impossible as regards the particular promisor, for what one person cannot do, another may be able to do (*Thornborrow v. Whitacre* (1706), 2 Ld. Raym. 1164).

(1) *Antecedent Impossibility.*

Where at the time of entering into the contract performance had already, without the knowledge of either party, become impossible, the contract is void (*Strickland v. Turner* (1852), 7 Exch. 208).

This principle is incorporated in the Sale of Goods Act, 1893, for by § 6 it is provided that where there is a contract for the sale of *specific* goods, and the goods without the knowledge of the seller had perished at the time when the contract was made, the contract is void. The price if paid, can be recovered (*Strickland v. Turner, supra*). Where part only of the specific goods sold are in existence, the balance having been stolen, the contract is void (*Barrow, Lane and Ballard, Ltd. v. Gilbert J. McCaul & Co.* (1929), 73 S.J. 451).

(2) *Subsequent Impossibility.*

Impossibility of performance arising after a contract has been entered into does not *prima facie* excuse a party from his obligations under the contract; if he cannot perform what he has promised he must pay damages, even though the impossibility has arisen through no fault of his own. If he wished to guard against any particular risk, he should have inserted a clause to that effect in the contract, such as the "strikes or bad weather" clause frequently found in building contracts.

Budgett v. Binnvinton ((1891), 1 Q.B. 35).

The unloading of a ship was delayed beyond the date agreed with the shipowners owing to a strike of dock labourers.

Held: The shipowners were entitled to damages, the impossibility of performance being no excuse

Where, however, the impossibility is of such a kind as to amount to "frustration" in the legal sense of

the word, both parties are excused from further performance. "Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If, therefore, the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally, if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising, frustration does not occur. Neither, of course, does it arise where one of the parties has deliberately brought about the supervening event by his own choice. But, where it does arise, it operates to bring the agreement to an end as regards both parties forthwith and quite apart from their own volition" (Per Viscount Simon, L. C., in *Cricklewood Property & Investment Trust Ltd. and Others v. Leighton's Investment Trust Ltd.* (1945), A.C. 221).

Supervening events which are of such a fundamental character as to bring about frustration and to release both parties from further performance of the contract may be classified as follows :—

- (a) Where a contract is made on the basis of the continued existence of a specific thing, or the continuance of some existing state of affairs, or the happening of some future event, further performance will be excused if the specific thing

ceases to exist, or the state of affairs ceases to continue, or the event fails to take place.

Taylor v. Caldwell (1863), 3 B and S. 826).

A contract was made for the use of the Surrey Gardens and Music-Hall on four days in the summer for the purpose of giving concerts and fêtes. Before the date arrived, the hall was destroyed by fire.

Held : Further performance of the contract was excused, because it had been made on the basis that the hall should continue to exist.

Krell v. Henry (1903), 2 K.B. 740).

A contract was made to hire a room, the object being to view the Coronation procession of King Edward VII. Owing to the King's illness the procession was abandoned.

Held : The contract of hire failed, as the taking place of the procession was the basis of the contract to the knowledge of both parties.

- (b) Death of either party will excuse further performance of a contract of personal service. Illness or other incapacity will similarly excuse, if the disability is of such a nature as to make performance practically impossible.

Robinson v. Davison (1871), L.R. 6 Ex. 269).

A pianist was prevented by illness from playing the piano in accordance with his contract at a concert to be given on a specified day.

Held : The pianist was not liable in damages for his failure, since the whole contract between the parties was based upon the assumption by both that the performer would continue living, and in sufficient health to play on the day named. This was really the very foundation of the promise, and where the foundation fails, the promise built on it must fail also.

This rule only applies to contracts which require personal performance; in other cases, illness is no excuse, and in the case of death the personal representatives of the deceased will be liable for the performance of the contract.

- (c) A change in the law rendering further performance illegal discharges a contract. Outstanding

examples of frustration of this nature arise in connection with contracts which cannot be performed on the outbreak of war because they would involve trading with the enemy, and contracts for the sale of goods, which cannot be performed owing to the subsequent imposition of a rationing system.

(3) *Law Reform (Frustrated Contracts) Act, 1943.*

Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions have effect in relation thereto by virtue of the Law Reform (Frustrated Contracts) Act, 1943 :—

- (a) All sums paid to any party in pursuance of the contract before the time of discharge are recoverable by the party by whom they were paid (subject to retention of expenses as in (c) below) ;
- (b) All sums payable to any party before the time of discharge cease to be payable (subject to the recovery of expenses as in (c) below) ;
- (c) A party who has before the time of discharge incurred expenses in connection with the performance of the contract, may, if the Court so allows, retain or recover in respect of such expenses out of the money so paid or payable to him ;
- (d) A party who has obtained a valuable benefit before the time of discharge by reason of something done by another party in connection with the contract, must pay to such other party such

sum, not exceeding the value of the benefit, as the Court thinks just having regard to all the circumstances of the case.

In estimating the amount of expenses incurred, overhead expenses and personal services are taken into account, but not insurance money payable by reason of the frustration unless the contract or any enactment imposed an obligation to insure.

In fixing the sum to be paid for valuable benefit obtained, the Court will have regard to expenses incurred by the benefited party (including payments made by him under (c) above), and the effect in relation to the benefit of the circumstances giving rise to the frustration of the contract.

The Act does not apply :

- (i) If, although the contract has become frustrated, the circumstances are not such as to excuse further performance. In such a case, damages for breach of contract will be payable by the party in default in the normal way ;
- (ii) If the time of discharge is prior to 1st July, 1943 ;
- (iii) To contracts containing express provision as to frustration, so far as such provision is inconsistent with the Act ;
- (iv) To that part of a frustrated contract which is severable from the rest and which has been wholly performed at the time of discharge ;
- (v) To any charter party (except a time charter party or a charter party by way of demise). The reason for excluding certain charter parties from the application of the Act was that by the general maritime law it had for

long been established that advance freight was not repayable even though ship and cargo were lost before the delivery could be effected, and that, unless otherwise agreed, freight (other than advance freight) was only payable if the contract was completely performed; and it was not desired to make alterations to those rules, which would have involved substantial modification of insurance practice.

- (vi) To any contract (other than a charter party) for the carriage of goods by sea. The Act is excluded from application to these contracts for the same reason as in the case of a charter party;
 - (vii) To any contract of insurance;
 - (viii) To a contract for the sale of specific goods which perish before the risk has passed to the buyer. In this case the provisions of § 7 of the Sale of Goods Act, 1893, will apply in lieu;
 - (ix) To any other contract for the sale of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.
- (e) Operation of Law.

The principal cases of discharge of a contract by operation of law are—

(1) *Merger*.

By the doctrine of merger, a contract of lower degree is merged into one of higher degree relating to the same matter, thus a preliminary agreement becomes merged in the subsequent deed. A judgment merges in itself the debt forming the subject of the action.

(2) *Bankruptcy.*

Upon obtaining his discharge a bankrupt is freed from liability in respect of all debts, with certain exceptions, provable in the bankruptcy. And although existing or continuous contracts may be adopted by the Trustee, the latter can put an immediate end to those of an unprofitable nature by disclaimer.

(3) *Limitation Act, 1939.*

It is considered expedient that any right to which a person is entitled should be enforced by action, if such action is necessary, within a reasonable time. Action must be brought within the following periods after the cause of action first arose :—

(1) *Within one year.*

In actions against any person in connection with the execution of any Act of Parliament or any public duty or authority ;

In actions by moneylenders for the recovery of money lent and interest, and for the enforcement of securities (with exceptions) ;

(2) *Within two years.*

In actions under statutes to recover sums by way of penalty or forfeiture ;

(3) *Within six years.*

(a) In actions on simple contracts ;

(b) In actions on torts (including the tort of conversion of goods) ;

(c) In actions to recover rent, mortgage interest, interest on judgment debts, or interest on legacies ;

(d) In actions by beneficiaries under trusts ;

(e) In actions to enforce a recognizance, or an award when the submission is not by an instrument under seal ;

- (f) In actions under statutes (except to recover sums by way of penalty or forfeiture);
- (4) *Within twelve years.*
 - (a) In actions on specialty contracts (except to recover rent or mortgage interest);
 - (b) In actions, to enforce a judgment (except to recover interest on a judgment debt), or an award when the submission is by an instrument under seal;
 - (c) In actions to recover mortgage money secured on real or personal property, or the proceeds of sale of land;
 - (d) In actions to recover land;
 - (e) In actions in respect of any claim to the personal estate of a deceased person, or any share or interest in such estate (other than interest on a legacy);
- (5) *Equitable relief.*

In actions for specific performance, injunction or other equitable relief, if the claim is analogous to a common law claim, within the same time as in the case of the corresponding common law claim; and in any case, without undue delay.

Time does not begin to run against the creditor until the date when the cause of action first accrued, and this is not necessarily the same as the date when the contract was made. Thus if money is left with a banker on current account and is not drawn upon for more than six years, the customer's right of repayment remains. The cause of action does not accrue until a demand for repayment has been made, because until then there is no obligation on the banker to repay the money.

Ledingham and Others v. Bermejo Estancia Co. Limited ((1947), 1 All E.R. 749).

Loan creditors of a Company signed a document in 1930 waiving payment of interest on their loans as from a date in 1927 until such time as the Company was in a position to pay the interest. The Company ceased to carry on business in 1946. The executors of the loan creditors (who had since died) thereupon claimed payment of the interest, but the Company pleaded that the earlier interest was statute-barred.

Held : The waiver was a binding agreement precluding the creditors from suing, made in consideration of the Company carrying on business, and hence no cause of action arose until 1946, when the waiver terminated by reason of the Company ceasing to carry on business. Time did not begin to run until 1946, and the claim was not statute-barred.

The making of a winding-up order against a company or a receiving order in bankruptcy proceedings against an individual stops time running, so that if debts are not statute-barred at the time of the making of the order, the rights of the creditors to prove are not affected by subsequent lapse of time.

While any person who would have been a necessary party to an action is an enemy or detained in enemy territory, the period of limitation does not run, and does not expire until the end of twelve months after he ceased to be an enemy or detained, or after 28th March, 1945, whichever is the later (Limitation (Enemies and War Prisoners) Act, 1945).

In the case of actions for the recovery of land or in respect of the conversion of goods, the title as well as the remedy is extinguished by the lapse of time, but in other cases the liability of the defaulting party still remains and may be enforced in other ways than by action, and may be revived by an acknowledgment or part payment.

Acknowledgments and Part Payment.

An acknowledgment of the debt or part payment, if made before the debt is statute-barred, may start time running again, and if made after will revive the debt

for a further period. An acknowledgment is sufficient to revive the debt or to start time running again if it amounts to an admission that the debt is owing; it is not necessary that a promise to pay should be implied. Thus, a letter acknowledging the debt but refusing to pay on the grounds that it was statute-barred would be sufficient. The acknowledgment must be made by the party to be charged or his duly authorised agent.

Re Coliseum (Barrow) Limited ((1930), 2 Ch. 44).

The balance sheet of a company disclosed arrears of directors' fees outstanding, which had fallen due prior to the limitation period. The directors claimed payment, but the Company pleaded the Statute of Limitation.

Held : The directors had no authority to bind the Company by an acknowledgment in their own favour as directors, and their claim was therefore statute-barred.

Ledingham and Others v. Bermejo Estancia Co. Limited ((1947), 1 All E.R. 749).

The balance sheet of a Company disclosed arrears of loan interest outstanding, which had fallen due prior to the limitation period, in favour of the trustees of a deceased creditor, such trustees being also directors of the Company. The trustees claimed payment, but the Company pleaded the Limitation Act, 1939.

Held : It was impossible to say that the Board of Directors was acting without the authority of the Company, merely because the acknowledgment was made to themselves as trustees, and the interest was therefore recoverable.

The acknowledgment must be made to the person entitled or his agent.

Bowring-Hanbury's Trustees v. Bowring-Hanbury ((1943), Ch. 104).

Executors acknowledged a statute-barred debt in an Inland Revenue Affidavit.

Held : This did not operate to revive the debt in favour of the creditor, since the acknowledgment was not made to him or his agent.

Where there are two or more joint debtors, an acknowledgment by one of them will not start time

running again against the other of them. Part payment by one of them, if made before the debt has become statute-barred, will start time running again against both of them ; but if made after the debt has become statute-barred, it will not revive the liability of the other.

Disabilities.

If at the date when the cause of action arose the claimant was an infant, a lunatic or (in certain cases) a convict, time does not begin to run against him until the disability ceases. Once time has started running, however, the occurrence of a disability will not interrupt it. Furthermore, if a person to whom a right of action accrued while under a disability, dies, time begins to run as from his death notwithstanding that the person to whom the right of action has passed may himself be under a disability. The absence of the debtor beyond the seas does not prevent time running in his favour.

Fraud or Mistake.

Where an action is based on fraud, or a right of action is concealed by fraud, or an action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake, or could with reasonable diligence have discovered it. This rule will not, however, operate to the prejudice of a *bona fide* purchaser of an interest in property which his predecessor may have acquired by fraud or mistake.

§ 12.—Variation of the Contract.

As a general rule, the terms of a contract once agreed upon cannot be varied without the consent

of the parties, and any unauthorised alteration of a material fact, where the contract is in writing, would render the contract unenforceable by the party who has made the alteration. (See Chap. IV, § 18 (c), for the effect of alteration of a bill of exchange.)

Where the parties have consented to variation, such variation should be evidenced in the same manner as the original contract. A contract in writing can therefore be amended by another written instrument, and a deed by another document under seal. If the contract is one to which § 4 of the Statute of Frauds or § 4 of the Sale of Goods Act, 1893, applies, the amending instrument must comply with the requirements as to contents as the original instrument was required to do. If, however, the purported variation is in the nature of a forbearance for the convenience of the parties (*e.g.*, where it was agreed to defer deliveries of coal), the contract, if originally in writing so as to satisfy the provisions of § 4 of the Sale of Goods Act, will still be enforceable notwithstanding that the variation was not so evidenced (*Bessler, Waechter and Glover & Co. v. South Derwent Coal Co.* (1937), 4 A.E.R. 552).

The Common Law rule with regard to deeds is subject to a modification for Equity recognised variation by an agreement in writing not under seal, and the Equity rule is deemed to prevail in view of the provisions of § 44 of the Supreme Court of Judicature Act, 1925 (see *Berry v. Berry* (1929), 167 L.T. 502).

§ 13.—Construction of the Contract.

The following are the principal rules governing the construction of contracts :—

- (a) The language must be construed so as to carry out the intention of the parties as shown by the whole of the terms.
- (b) Words must be presumed to have their literal meaning, but evidence is permissible to identify persons or things mentioned in a contract, or to show that words apparently unambiguous were used in a special sense by the contracting parties, provided that such evidence merely explains and does not contradict the terms of the contract. This rule is frequently applied in mercantile contracts, where evidence is adduced to show that by the custom of merchants certain words are used in a technical sense other than their usual meaning. Although such evidence is permissible to explain *latent* ambiguities, parol evidence is never permissible to explain a *patent* ambiguity, that is, an ambiguity apparent on the face of the document and not raised by extrinsic facts.
- (c) If there are two possible constructions, one legal and the other illegal, the legal construction must be adopted.
- (d) Words are to be construed most strongly against the party who would benefit by them.
- (e) If there be an alternative in the contract, the option as to the alternative lies with the person who has to do the first act.
- (f) The contract must be construed according to the law of the country where it is made (*lex loci* as it is called), unless it was clearly the intention of the parties that this should not

be so. But rules of evidence and procedure are governed by the law of the country where the action is brought (*lex fori*).

- (g) The contract must be construed in relation to any custom attaching to the particular trade, or to the locality to which the contract applies. Such custom must be sufficiently established to justify the fact that its terms are not incorporated in the contract, the parties being presumed to be aware of its existence. To be enforceable, it must not be inconsistent with the terms of the contract, nor must it be contrary to law. It must also be certain, reasonable and consistent, and must be accepted by the mercantile community. Custom must not be regarded as in any way static, but may be extended with the natural expansion of mercantile transactions, *e.g.*, instruments which were not at one time regarded as negotiable may, in time, come to be so regarded. The Courts will take judicial notice of a general custom, but a local or particular custom must be proved.

Custom would be operative in the following examples :—

- (1) In contracts of employment, notice of termination to be given by either party would, in the absence of specific agreement, be taken to be the equivalent of the intervals of payment of remuneration. In the case of particular professions special custom may be proved, *e.g.*, where an actor is engaged for a play running at a London West End

theatre, the engagement would, according to the custom of the theatrical profession, be for the run of the piece, and not for an indefinite period terminable by notice (*Edwardes (Daly's Theatre) Ltd. v. Comber* (1926), 42 T.L.R. 247).

- (2) In contracts for the occupation of dwelling houses, where no arrangement is made as to period of notice, such period is usually determined in relation to the intervals at which the rent is payable.

§ 14.—Conflict of Laws.

As mentioned in the previous section, a contract may be affected by the laws of more than one country, and it then becomes a matter of determination as to which national law the contract is subject. There is no conflict in the true sense, as the contract, or any particular phase of it, can be subject to the law of one country only; but the validity of the contract might be governed by the law of one country and its enforcement by the law of another. Thus in *Leroux v. Brown* the contract was unenforceable in this country (though an action might have been successfully brought in France) since the written memorandum requisite in the circumstances under § 4 of the Statute of Frauds was not in existence. If the *validity* of the contract had depended upon the existence of this memorandum, the contract would have been enforceable even though the action was brought in England, for the law of France (where the contract was made) has no corresponding provision.

In view of the fact that bills of lading must follow the goods to which they relate, in order that delivery

can be obtained, much has been achieved to minimise confusion by the agreement between the chief maritime powers upon uniform provisions, which have received Parliamentary approval, so far as this country is concerned, in the form of the Carriage of Goods by Sea Act, 1924 (*see* Chap. VIII, § 9).

Bills of exchange, too, by their negotiation, might cause the application of the law of more than one country, but the position is well-defined, and appeals to the Courts in this connection are somewhat rare. If a bill of exchange is drawn in this country, payable in Germany, and indorsed in France, the English law will apply in respect of the form and drawing of the bill, German law to the presentment for acceptance and for payment and matters arising thereout, and French law to the indorsement; and this is irrespective of the country in which any action may be brought.

Most of the cases before the Courts have relation to individual contracts of a specific character, and in such cases, the terms of the contract itself must be considered with a view to ascertaining the intention of the parties, where the conditions are subject, on the face of the contract, to the laws of two or more countries. Where determination is not practicable by this means, the general rule is that the contract will be governed by the law of the country where it was made (*lex loci contractus*).

An English company carrying on business in London and having a branch office in Alexandria, entered into a contract with a firm of which one partner was a Scotsman and the other a Hungarian, trading in Alexandria, for the shipment of a cargo of cotton seed from that port to London. The goods were shipped on a Swedish vessel which on the voyage became a constructive total loss, delivery of the goods being taken at Cadiz. All the documents were in English

and the contract provided for the payment of the freight in this country. There was nothing in the contract to indicate that the goods were to be carried by any particular line or by any ship of any particular nationality. The question of the payment of distance freight arose, which rested upon whether the contract was to be governed by English, Swedish or Egyptian law. It was held that the parties evidently intended English law to apply, and distance freight was consequently not payable (*The Adriatic* (1931), 47 T.L.R. 638).

Although the Courts of this country will enforce a contract subject to the law of a foreign State (upon the production of evidence of what the legal provisions actually are), they will not do so if the contract is in conflict with generally accepted principles of morality or justice, nor perhaps where the contract would be illegal in the country where the contract is to be carried out, although the law of this country may not have been infringed. An assignment of a debt, due by an English debtor and payable on demand in England, was made in a foreign country between two citizens of that country domiciled there, but was invalid by the law of that country. It was held not to be valid in this country merely because it was in accordance with the requirements of English law (*The Republic of Guatemala v. Nunez* (1926), 42 T.L.R. 625). In another case, a number of persons entered into a contract for equipping a steamer for the purpose of importing whiskey into the United States. A dispute arose, which culminated in an action in the Court in this country, and it was held that the contract was void as against public policy, as it had been formed with the view to the committal of an act which was criminal by the law of the United States, and no proceedings could therefore be brought with regard to any right as between the parties (*Foster v. Driscoll* (1929), 98 L.J.K.B. 282).

§ 15.—Enforcement of Foreign Judgments.

If a judgment has been obtained in a foreign country, it may be desired by the successful party to enforce it in this country if the defendant is resident or carries on business here or owns property situated here.

Whilst the English Courts have for some time afforded facilities for the enforcement in this country of judgments obtained abroad, the practice was founded on international courtesy only, but codification has been effected by the passing of the Foreign Judgments (Reciprocal Enforcement) Act, 1933.

The Act extends to judgments given in the superior Courts (*i.e.*, those Courts corresponding to our own High Court) of any foreign country where substantial reciprocity of treatment is assured, and will become operative as regards any particular country by Order in Council. Such Order may be subsequently varied or revoked as circumstances shall dictate.

For a judgment to be enforceable, it must be final and conclusive as between the parties thereto, and must involve the payment of a sum of money not being taxes or other charges of a like nature or in respect of a fine or other penalty (§ 1).

The judgment creditor may apply to the High Court at any time within six years after the date of the judgment, or of the determination of an appeal, to have the judgment registered in the High Court, and registration will be effected upon satisfactory proof of the matters prescribed. The judgment will not, however, be registered if it has been wholly satisfied, or if it could not be enforced by execution in the country of the original Court. Upon registration, the judgment can be enforced, including a claim for

interest, in the same manner as if it had been originally obtained in the registering Court. Provision is made for a stay of execution during the period for which it is competent for any interested party to make application for setting aside the registration of the judgment.

Where the sum payable under a foreign judgment is expressed in a foreign currency, conversion into sterling is to be effected at the rate of exchange ruling at the date of the judgment in the original Court.

In addition to the sum payable under the judgment including any interest which by the law of the foreign country becomes due under the judgment up to the time of registration, the judgment shall be registered for the reasonable costs of and incidental to registration, including the costs of obtaining a certified copy of the judgment from the original Court (§ 2).

Power is given to make Rules of Court with regard to such matters as the lodgment of security for costs by persons applying for registration, the service on the judgment debtor of notice of registration, the fixing of the period within which application can be made for the registration to be set aside, etc. (§ 3).

Registration shall be set aside if the registering Court is satisfied—

- (1) That the judgment is not actually a judgment to which the Act applies.
- (2) That the original Court had no jurisdiction in the circumstances of the case.
- (3) That, notwithstanding that the debtor had been duly served with notice of the proceedings in the original Court, he did not receive the notice

in sufficient time to enable him to defend the proceedings and did not appear.

- (4) That the judgment was obtained by fraud.
- (5) That the enforcement of the judgment would be contrary to public policy in this country.
- (6) That the rights under the judgment are not vested in the person by whom application for registration was made (§ 4).

The Act may, by Order in Council, be made applicable to any of His Majesty's Dominions and to judgments obtained in the Courts of such Dominions. The term "Dominion" shall be construed as including any territories which are under His Majesty's protection and to any territories governed under mandate from the League of Nations (§ 7).

SYNOPSIS OF CHAPTER II

AGENCY

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CHAPTER II

AGENCY

§ 1.—Definition of Agency.

An *agent* is a person having express or implied authority to represent, or act on behalf of, another person, who is called the *principal*, with the object of bringing the principal into legal relations with third parties.

The relationship between the principal and the agent is called *agency*. It is usually, though not necessarily, created by contract between the principal and agent and is then analogous to, but not identical with, the contract between master and servant.

§ 2.—Capacity to appoint, or act as, Agent.

Any person capable of entering into a contract on his own behalf may do so by means of an agent, and that, even although the agent might, on account of infancy or for some other reason, be incapable of entering into the contract on his own behalf. An act done by an agent, as such, is deemed to be the act of the principal who authorised it, the agent being looked upon merely as an instrument; hence a person having no capacity to contract on his own behalf is competent to contract on behalf of and so bind his principal.

But a legal disability to contract personally cannot be surmounted by the appointment of an agent, for the power to be given to the agent must be possessed by the principal. The agent is regarded as the mouth-piece of the principal.

§ 3.—Classification of Agents.

A UNIVERSAL AGENT is one who has unrestricted authority to contract on behalf of his principal.

Such appointments are rare, but might arise under an unlimited power of attorney.

A **GENERAL AGENT** is one who has authority to act for his principal in all matters concerning a particular trade or business, or in some specified direction such as the administration of an estate; or to do some act in the ordinary course of his trade, profession, or business as an agent, on behalf of his principal.

A **SPECIAL AGENT** is one who has authority to do some particular act, or represent his principal in some specific transaction.

A **DEL CREDERE AGENT** is a mercantile agent who, in consideration of a higher rate of remuneration than is otherwise paid, undertakes that persons with whom he enters into contracts on behalf of the principal shall duly perform those contracts. An agreement by an agent to sell on a *del credere* commission is not a promise to answer for the debt, default, or miscarriage of another person within the meaning of § 4 of the Statute of Frauds, and it is therefore not necessary that such an agreement should be in writing; it is rather a promise of indemnity to the employer against the agent's own inadvertence or ill-fortune in making contracts with persons who cannot perform them by reason of their insolvency (*Sutton v. Grey* (1894), 1 Q.B. 285). A *del credere* agent must, of course, be capable of entering into a valid contract with his principal; for although the agent's disability would not affect a contract as between the principal and third parties, the principal's own remedy on the indemnity may be lost by the agent's want of capacity to contract personally. This is not strictly a separate classification, as the relationship of principal and agent rests upon another contract to which the *del credere* arrangement is subsidiary.

§ 4.—Appointment of Agent.

The relation of agency exists, and can only exist by virtue of the expressed or implied assent of both principal and agent, except in certain cases where the relation arises by operation of law, known as AGENCY OF NECESSITY. Such relation may arise by—

- (a) Express appointment by the principal ;
- (b) Implication of law, or by necessary operation of law, from the situation of the parties ;
- (c) Subsequent ratification by the principal of acts done on his own behalf.

(a) Express Appointment.

As regards express appointment, there is generally no particular form in which it need take place ; but if the agent is authorised to contract under seal, his appointment must be by power of attorney, i.e., under seal ; and the appointment of an agent by a corporation, other than a trading corporation, must also be under seal.

An agent to contract under §§ 1–3 of the Statute of Frauds (repealed and re-enacted by the Law of Property Act, 1925, §§ 54 & 55)—that is to say, to make a lease for more than three years—must, under that Act, be appointed in writing ; and since by the Real Property Act, 1845, § 3 (now repealed and re-enacted by the Law of Property Act, 1925, § 52) these contracts now require to be under seal, the appointment must be by deed. An agent to let for a period not exceeding three years may be appointed verbally.

An agent to sign for his principal a declaration of willingness to act as director, for the purpose of being filed with the Registrar of Companies, or an agent to sign for his principal a copy of the prospectus, for the purpose of filing with the Registrar, must be appointed

in writing (§§ 41 & 181, Companies Act, 1948). The holder of a proxy must also be appointed in writing.

As regards contracts within § 4 of the Statute of Frauds, or § 4 of the Sale of Goods Act, 1893, an agent to enter into such contracts may be appointed verbally, and may then sign the written memorandum upon which the contract may be enforced (*Higgins v. Senior* (1841), 8 M. & W. 834).

(b) Implied Appointment and Agency of Necessity.

When a person assumes to act for another, the assent of the person on whose behalf the act is done will not be implied from his mere silence or acquiescence, unless the situation of the parties is such as to raise a presumption that the act is done by his authority (*Dixon v. Broomfield* (1814), 2 Chit. 205).

But if the circumstances are such that the apparent agent acts by authority of the principal, the assent to such agency can be implied, and the agency is an AGENCY BY ESTOPPEL (*Pickering v. Busk* (1812), 15 East 38).

An auctioneer, in a sale by public auction, is agent for the seller, and after the fall of the hammer he is also, by implication of law, agent for the buyer; and his signature will then bind both parties under § 4 of the Sale of Goods Act, 1893, or § 40 of the Law of Property Act, 1925.

In certain circumstances a person may become the agent of another without any express or implied appointment, and is known as an AGENT OF NECESSITY. Thus, a master of a ship or a common carrier may, when so compelled by circumstances, pledge his employer's credit; and a wife who has been deserted by her husband may become his agent of necessity to pledge his credit for necessities. (See § 13 (f))

post.) In *Prager v. Blatspiel, Stamp & Heacock* ((1924), 1 K.B. 566), it was held that the doctrine of agency of necessity was not confined to certain classes of agents only; but the agent must prove such an emergency as compelled him to act as he did. In such circumstances there is an inference that the agent must protect the interests of his principal and that he has, therefore, an implied authority to bind his principal in the performance of acts of an exceptional character and done in good faith.

The case of the *Great Northern Railway v. Swaffield* ((1874), 9 Ex. 132) affords an illustration of this principle. A. had sent a horse from King's Cross to Sandy, and upon arrival at its destination the animal was not met, nor was an address available to which the horse could be delivered. It was held that the railway company were able to recover from the owner the livery stable charges necessarily incurred in the circumstances.

If a person performs an unauthorised act in relation to another's property, he cannot claim the protection of the doctrine of agency of necessity merely because it was convenient to perform the act. Thus in *Sachs v. Miklos and Others* ((1948), 1 All E.R. 67), a gratuitous bailee of furniture, who found it inconvenient to retain the articles and who was unable to communicate with the owner, sold them without the owner's authority. On being sued for conversion, the bailee failed to establish an agency of necessity, the sale of the furniture being no more than an act of convenience, and was held liable in damages.

For such an agency to exist the act must be performed in such circumstances as would render it impossible to obtain the presumptive principal's instructions.

In *Springer v. Great Western Railway Co.* ((1921), 1 K.B. 257), S., in Jersey, had sent a consignment of tomatoes to London. They arrived at Weymouth three days late and, owing to a railway strike, a further two days' delay occurred in unloading. They were then found to be in poor condition

and, to minimise the loss, the railway company decided to sell them locally. The railway company was held liable to S. for the loss. S.'s instructions could and should have been obtained when the condition of the tomatoes was discovered.

(c) Appointment by Ratification.

Where an act is done in the name or on behalf of a person without his authority, by another person assuming to act as his agent, the person in whose name or on whose behalf the act is done may, by ratifying this act, make it as valid and effectual as if it had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all; but the only person who has power effectively to ratify an act is the person in whose name or on whose behalf the act was done, and IT IS NECESSARY THAT HE SHOULD HAVE BEEN IN EXISTENCE, AND CAPABLE OF BEING ASCERTAINED AT THE TIME THAT THE ACT WAS DONE (*Marsh v. Joseph* (1897), 1 Ch. 214).

A company cannot, after incorporation, ratify a contract entered into by the promoters on behalf of the company before its incorporation, since it was not in existence at the time the contract was made (*Kelner v. Baxter* (1866), 2 C.P. 174); it may, of course, enter into a new contract on the same lines if appropriate power exists (*Ashbury Carriage Co. v. Riche* (1875), 7 H.L. 653); or incur liability by taking a benefit under the contract (*Touche v. Metropolitan Warehousing Co.* (1871), 6 Ch. 671).

Where an offer is made to an agent, and is accepted by him without authority, the acceptance may be ratified by the principal, and the contract thereby be made binding on the person who made the offer, even if he has, in the meantime, given notice to the principal of the withdrawal of the offer. The

ratification of the principal is of the acceptance by the agent and consequently relates back to such date.

Thus A. made an offer to B., the managing director of a company, by whom it was accepted, without authority, on behalf of the company. A. then withdrew his offer, and gave the company notice to that effect, and the company subsequently ratified B.'s unauthorised acceptance. It was held that the ratification related back to the time of acceptance, and the withdrawal was rendered ineffectual (*Bolton Partners v. Lambert* (1888), 41 C.D. 295).

If an agent accepts an offer on behalf of his principal, *but subject to that principal's ratification*, the third party is entitled to withdraw the offer at any time before such ratification takes place; as the acceptance must be unconditional to be binding on the offeror (*Watson v. Davies* (1931), 71 L.J. 46).

A contract made by a person in his own name, not purporting to act on behalf of a principal, but having an undisclosed intention to act for another, though without that other's authority, cannot be ratified by that other so as to enable him to sue, or render him liable to be sued on the contract (*Keighley, Maxted & Co. v. Durant* (1901), A.C. 240).

No person is deemed to ratify an act done without his authority unless at the time of so doing he had a full knowledge of all the material circumstances under which the act was done (*Freeman v. Rosher* (1849), 13 Q.B. 780).

§ 5.—The Authority of the Agent.

An agent has implied authority to do whatever is necessary for the effective execution of his express authority in the usual way. The authority, whether express or implied, cannot exceed the limits of the powers of his principal (*Shrewsbury, &c., Railway Co. v. L. & N. W. Rly. Co.* (1857), 6 H.L. Cas. 113). Any general authority is regarded as authority to act only in the usual way and ordinary course of business (*Wiltshire v. Sims* (1808), 1 Camp. 258).

An agent who is given a general authority to conduct a particular trade or business, or to act in particular matters, has an implied authority to do anything which is incidental to the ordinary conduct of such trade or business, for the proper performance of the duties he undertakes; but he must not do anything outside the ordinary scope of his employment and duties. Authority of an agent to sell goods does not however, *of necessity*, imply an authority to receive payment of the price (*Butwick v. Grant* (1924), 2 K.B. 483), although there is *prima facie* authority (*New Forest Agricultural Co-operative Society v. Brown* (1927), L.J. C.C.R. 60); consequently if such authority can be implied from the circumstances and the agent misappropriates the amount received, the principal cannot again claim from the buyer the value of the goods. If an agent has authority to receive payment in cash for goods sold, but the purchaser receives notice that all cheques must be drawn payable to the order of the principal, and draws a cheque payable to the order of the agent, he (the purchaser) would be discharged from further liability, it being held that the notice was not sufficient to withdraw the agent's authority (*Bradford & Sons, Ltd. v. Price Bros.* (1923), 39 T.L.R. 272).

A principal may be estopped by his own conduct from denying the agent's authority (*Farquharson v. King* (1902), A.C. 325).

An agent has an implied authority to conform, in the pursuance of his agency, with the usages and customs of the place of business in which he is employed (*Sutton v. Tatham* (1839), 10 A. & E. 27), unless the usage or custom is illegal or unreasonable (*Hamilton v. Young* (1881), 7 L.R. Ir. 289), or has the effect of changing the character of the agency (*Robinson v. Mollett* (1874), 7 H.L. 802).

§ 6.—Delegation by the Agent.

An agent has no power to delegate his authority to a deputy or substitute, unless he has the express or implied assent of the principal; the maxim "*delegatus non potest delegare*" precluding delegation without such assent in all cases where the character of the agency involves personal confidence in the agent. The agreement of the principal to the delegation is implied where—

- (i) it is customary in the trade or business concerned, or
- (ii) it is necessary to the proper carrying out of the agency.

So, where a professional man, *e.g.*, a solicitor or accountant, is appointed to act for a client, delegation of some of the duties to clerks is permissible, and the agent takes responsibility therefor. A country solicitor is also empowered to employ a London agent for the conduct of proceedings in the Courts.

It is also considered that an agent has power to delegate his duties to another in the event of a sudden emergency, but for this course to be justified, there must be extreme urgency, and the inability on the part of the agent to communicate with his principal (*Gwiliam v. Twist* (1895), 2 G.B. 84).

If the agent himself delegates to a sub-agent, the agent is answerable to the principal for money received by such sub-agent to the use of the principal, and is also responsible to the principal for any damage arising out of the negligence, want of skill, or breach of duty of the sub-agent (*Swire v. Francis* (1877), 3 A.C. 106). There is no general rule that privity exists between a principal and a sub-agent. Such

privity will only exist where the principal has authorised his agent accordingly. Consequently, a principal cannot sue a sub-agent for the negligent performance of his duties (*Calico Printers' Association v. Barclay's Bank and The Anglo-Palestine Co., Ltd.* (1930), 170 L.T. 469).

Where an agent delegates his entire employment to a substitute, with the knowledge and consent of the principal, privity of contract may arise between the principal and the substitute, so as to render the substitute responsible to the principal for the proper performance of his duties, if such was the intention of the agent and of the substitute (*De Bussche v. Alt* (1877), 8 Ch. D. 286). Where a sub-agent is appointed without the authority, express or implied, of the principal, the principal is not bound by his acts (*Schmaling v. Thomlinson* (1815), 6 Taunt. 147).

§ 7.—Duties of the Agent to the Principal.

(a) To carry out the terms of the Employment.

An agent must carry out the terms of his agreement in accordance with the authority conferred upon him, and he must follow his principal's instructions, except where they are illegal (*Smart v. Sandars* (1848), 5 C.B. 895).

In the absence of express instructions he must act according to usage, if there is any custom (*Solomon v. Barker* (1862), 2 F. & F. 726); otherwise he may exercise his discretion so long as this is consistent with the terms of his employment, and he acts solely on behalf of his principal (*Gray v. Haig* (1854), 20 B. 219).

He must exercise proper care, skill, and diligence. A paid agent must always exercise the skill which is usual and necessary in such matters. A gratuitous

agent need not perform the agency, but if he does, he must exercise the skill that he possesses. Where a person holds himself out as possessing the skill and intelligence necessary for the carrying out of a particular undertaking, he must exercise such skill as one so holding himself out might be expected to possess. If the agent fails to exercise the proper degree of care, skill, and diligence, he is said to be negligent. As to whether there has been negligence is a question of fact depending upon the nature of the agency and the surrounding circumstances, and its determination is often one of considerable difficulty. The only general rule which can be laid down is that the agent must display such care and diligence as would be expected from that fiction of the law, "the reasonable man," he must do all those things which are generally considered proper in the particular class of agency in which he is employed.

The agent must not act in any way that would be inconsistent with his agency, and therefore any custom which would give him the character of a principal, or which would give him an interest opposed to his duty as agent, is an unreasonable custom, and will not bind those who had no cognisance of it.

The agent must not deny the title of the principal to goods entrusted to him by the principal, and he must not, when acting as agent, sell the goods of the principal to himself, or acquire any interest in them.

Thus where A. employed a broker B. to sell goods, and B. sold the goods to C., but in such a way that they were really sold to himself and C. jointly, upon B. going bankrupt with the goods still in his possession (C. also being bankrupt), the principal had a right to repudiate the contract, and to recover the actual goods from the Trustee in the bankruptcy (*ex parte Huth, re Pemberton* (1840), Mont. & Ch. 667).

(b) To Account.

The agent must pay over to his principal all money received on behalf of the latter, and must keep such money, and, in fact, all property of the principal, separate from his own money and property, or that of other persons. If he were to pay the money of his principal into his own bank, and such bank were to fail, he would be responsible for the same, even though receiving no remuneration for his agency (*Massey v. Banner* (1820), 1 Jac. & W. 241). He must always be ready with accounts of transactions that have arisen in the course of his agency (*White v. Lincoln* (1803), 8 Ves. 363). He must preserve all documents relating to the affairs of his principal, and must produce them when required.

When accounts have been settled, the principal has no right to have them reopened, unless the agent has committed fraud; and if this is the case, such accounts will be reopened *ab initio*, and the agent cannot set up the Statutes of Limitation against it. If, however, fraud has not been committed, he may plead, and is entitled to the benefit of, the Statutes of Limitation, unless he is sued for property entrusted to him in his capacity of agent, or for the proceeds or value of any such property converted by him to his own use (*Re Lands Allotment Co.* (1894), 1 Ch. 616).

(c) Secret Profits.

The agent must not make any profits without the knowledge and consent of his principal. Any profits so acquired must be paid over to the principal.

Regier v. Campbell-Stuart (1939), Ch. 766).

An agent agreed to act for a principal in obtaining a house. He bought a house for £2,000 in the name of a nominee, and subsequently entered into a contract with the nominee to

purchase it from him for £4,500. He then re-sold it to his principal for £5,000, representing that he had paid £4,500 for it.

Held : The agent was liable to account to the principal, not only for the £500 profit, but also for the £2,500 profit on the previous transaction.

If a principal is aware that the agent receives a recompense from third parties for his work, but misunderstands the extent of it, the principal will have no right to claim such remuneration, unless the agent has wilfully misled the principal (*Great Western Insurance Co v. Cunliffe* (1874), 9 Ch. 525).

The director of a company standing in the nature of a paid agent of the company is not entitled to the benefit of any profit or advantage arising from his employment as the agent of the company, unless the company itself approves him retaining such benefit.

In *Re North Australian Territory Co., Archers' case* ((1892), 1 Ch. 322), A. agreed to accept the office of director upon the terms that he was indemnified by the promoters for the sum paid by him for his qualification shares. After the resignation of A. from the office of director, the promoters purchased the shares, which had become worthless, at the original price paid by him; and it was held that A. must account to the company for the sum so obtained, i.e., the value of the indemnity obtained under the secret agreement.

If a director receives a gift of any kind from the promoters of the company, he can be compelled to pay over to the company the actual gift, or its maximum value during the period that he has had it in his possession, at the option of the company (*Eden v. Riddlesdale's Lamp Co.* (1889), 58 L.J., Q.B. 579).

The Prevention of Corruption Act, 1906 (§ 1), provides as follows :—

1.—(1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in

relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business ; or

If any person corruptly gives or agrees to give, or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of the Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business ; or

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal, he shall be guilty of a misdemeanour, and shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine, or on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding fifty pounds, or to both such imprisonment and such fine.

In order to prosecute under this Act it is necessary to obtain the consent of the Attorney-General or Solicitor-General.

Where an agent has received a secret commission, the principal may, on discovering the fact, repudiate the contract (*Bartram & Sons v. Lloyd* (1904), 20 T.L.R. 281) ; he may also recover such commission back from the agent (*Andrews v. Ramsey & Co.* (1903), 2 K.B. 635) ; and may refuse him any remuneration. If the commission has caused him to pay a higher price than he otherwise would have done, he may recover the excess from the other party (*Hovenden & Sons v. Millhoff* (1900), 16 T.L.R. 506).

If a bribe has been taken by an agent, he is liable to account to his principal for the money so received, or if it consists of property, for the maximum value of

such property while in his possession ; and the principal may recover such money with interest at 5 per cent. per annum thereon. If the bribery has resulted in a breach of duty to the employer, the agent will also be answerable in damages, and this irrespective of the right to recover the bribe (*Mayor of Salford v. Lever* (1891), 1 Q.B. 168). The agent will also under these circumstances forfeit the remuneration to which he would otherwise have been entitled (*Andrews v. Ramsey & Co.*, *supra*).

If money received by way of bribery is invested, the money cannot be followed, and the remedy of the principal is by way of an account, the relation between an agent and principal on this point being that of debtor and creditor.

§ 8.—The Liability of the Agent to the Principal.

An agent does not generally incur personal liability to his principal in respect of contracts made on his behalf, but as has already been shown, a *del credere* agent does actually under a collateral contract indemnify his principal against loss.

If the agent becomes bankrupt, the principal is entitled to recover money entrusted by him to the agent, for special application, which is still in the possession of the bankrupt ; and he may also recover other property (including debts due to the bankrupt as his agent) in the possession of the bankrupt. The agent must not, however, be in possession of such property under such circumstances that he is the reputed owner, since otherwise the " order and disposition clause " of the Bankruptcy Act, 1914, § 38, will apply to goods in his possession.

An agent would be liable in damages to his principal if he were guilty of a breach of duty. He must not disclose to third persons information of a confidential nature entrusted to him in the course of his duties, and liability would attach to him even after the termination of his agency.

A., whilst in B.'s employment, extracted a list of customers from B.'s order book and used it in a business which he subsequently established. It was held that it was an implied term of the contract that the employee should exercise good faith in view of the confidential relationship between him and his employer, and the latter was therefore entitled to damages and an injunction (*Robb v. Green* (1895), 2 Q.B. 315).

A similar decision was given in *Lamb v. Evans* ((1893), 1 Ch. 219), where A. was employed by B. as exclusive agent to canvas for orders for insertion of traders' names in B.'s directory. After the termination of his employment, A. attempted to use the information so obtained for the benefit of a rival publication.

§ 9.—Rights of the Agent against the Principal.

(a) Remuneration.

An agent, unless he has undertaken to act gratuitously (in which case he is not bound to take up the agency), is entitled to remuneration. If a contract, so far as remuneration is concerned, is in express terms, the agent will be entitled to the remuneration agreed upon; otherwise he is entitled to a reasonable remuneration.

Where a contract of agency provides for commission being paid to the agent, it is a question of construction of the contract whether in any particular case events have occurred which entitle the agent to his commission.

“The primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether these express terms necessitate the

addition, by implication, of other terms. . . . In contracts made with commission, there is no justification for introducing an implied term unless it is necessary to do so for the purpose of giving to the contract the business effect which both parties to it intend that it should have. It may be useful to point out that contracts under which an agent may be occupied in endeavouring to dispose of the property of a principal fall into several obvious classes. There is the class in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. If that is all that is needed in order to earn his reward, it is obvious that he is entitled to be paid when this has been done, whether his principal accepts the offer and carries through the bargain or not. No implied term is needed to secure this result. There is another class of case in which the property is put into the hands of the agent to dispose of for the owner, and the agent accepts the employment, and, it may be, expends money and time in endeavouring to carry it out. Such a form of contract may well imply the term that the principal will not withdraw the authority he has given after the agent has incurred substantial outlay, or, at any rate, after he has succeeded in finding a possible purchaser. . . . There is a third class of case where, by the express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between the offeror and his principal. . . . There seems to be no room for the implied term (that the principal will not without just cause so act as to prevent the agent from earning his commission) in such a case. The agent is promised a reward in

return for an event, and the event has not happened. He runs the risk of disappointment but, if he is not willing to run the risk, he should introduce into the express terms of the contract the clause which protects him" (Per *Viscount Simon, L. C.*, in the *Luxor Case* below).

Luxor (Eastbourne) Limited (in Liquidation) and Others v. Cooper ((1941), A.C. 108).

Luxor Limited wished to dispose of two cinemas, and agreed to pay their agent a commission on the completion of the sale to any purchaser whom he could introduce. He produced a purchaser who was able and willing to complete, but the Company then decided not to proceed with the sale of the property. The agent claimed his commission on the ground that there ought to be implied in his agency agreement a term to the effect that the Company would not without just cause so act as to prevent him from earning his commission.

Held: On the construction of the contract in question no such term was implied, and the agent was not entitled to his commission.

Jones v. Lowe ((1945), 1 K.B. 75).

A principal employed an agent to find a purchaser for her house, the terms of the contract of agency providing that commission should be payable "in the event of the agent's producing a purchaser." The agent found a purchaser ready and willing to complete, but the principal declined to sign a binding contract and withdrew her house from the market.

Held: On the express terms of the contract the commission was to be payable only on a purchaser being found, and a person willing to purchase did not become a purchaser until a binding contract of sale was entered into. Accordingly the agent was not entitled to commission.

Giddys v. Horsfall ((1947), 1 All E.R. 460).

A principal employed an agent to sell his house, commission being payable "in the event of the agent being instrumental in introducing a party prepared to purchase." The agent obtained a prospective purchaser, but the vendor withdrew before the contract was signed.

Held: The contract being for the payment of commission on the introduction, not of a purchaser in the sense of a person ultimately purchasing, but of a person prepared to purchase, the agents were entitled to their commission.

The agent must, to claim his remuneration, show that the transaction was due to his agency; he need not, however, actually complete the transaction, nor is it absolutely necessary that he should be acting for the principal at the time of the completion. It is sufficient if he can show that the transaction arose out of his agency, and that he was concerned with it during the negotiations.

An agent may, in certain cases, be entitled to commission in respect of transactions arising after his employment has ceased. This will depend entirely upon the actual terms of his employment as agent.

In *Toulmin v. Millar* ((1887), 58 L.T. 96) it was arranged that the agent should be allowed commission upon all orders executed by the principal and paid for by the customers arising from his introduction. In consequence of this express agreement the agent was entitled to commission on orders received even after he had left the service of his principals.

Again, in *Bilbee v. Hasse* ((1889), 5 T.L.R. 677) it was held that the plaintiff was entitled for life to commission on all orders introduced by him, and even that his executors would have a claim after his death; but in this case the customers were originally customers of the agent, and the transaction really resolved itself into a sale of the goodwill.

A further illustration is the case of *Salomon v. Brownfield* ((1896), 12 T.L.R. 239). Here the plaintiff agreed to go to Australia, and travel for the defendant upon the terms that he was to get $7\frac{1}{2}$ per cent. upon the net amount of cash received in payment of goods for orders which were obtained through him; also $7\frac{1}{2}$ per cent. upon all orders from customers introduced by him, on payment being made by them, whether such orders were obtained through his representation or not. As no period was put to the operation of the contract, Mathews, J., held that the intention was that payment should be made upon all orders received from customers introduced by the plaintiff. He saw no reason to import into the contract a term that it was only to last for a reasonable time, since it was open to the defendant to cease to deal with the customers introduced. The plaintiff, therefore, obtained a declaration that he was entitled to $7\frac{1}{2}$ per cent. upon all orders obtained and paid for from customers introduced by him.

If it can be shown that there is a well-known custom of trade that the right to commission on business introduced ceases with the termination of the agency, there will then be no right to remuneration on orders executed subsequently (*Barrett v. Gilmour & Co.* (1901), 6 Com. Cas. 72); and this may also be the case by reason of the Court's interpretation of the terms of the agreement (*Weare v. Brimsdown Lead Co.* (1910), 103 L.T. 429).

Even if the principal does not get any benefit out of the performance of the agency, the agent is entitled to his remuneration if he has done what he contracted to do. Thus, where an agent sold property for an agreed commission, and it was found that the purchaser was insane, and the seller relieved the purchaser's representative of the bargain, the principal was still held liable to pay the agreed commission (*Platt v. Depree* (1893), 9 T.L.R. 194). But if an agent is employed to find a purchaser, he has not earned his commission until he has found a purchaser able and willing to complete (*Poole v. Clarke & Co.* (1945), 2 All E.R. 445).

Where an agent has been instructed to sell property on commission, and in default of a purchaser being found, agrees with the principal to buy the property himself, he is not then really acting as agent, and is not entitled to the commission unless the principal has expressly agreed thereto (*Hocker v. Waller* (1924), 29 Com. Cas. 296).

Where an agent purports to act in a capacity which he is not entitled to assume, he cannot recover remuneration in respect of the agency; nor can he recover payment for services in relation to any wagering contract or agreement, which is rendered null and void by the Gaming Act, 1845.

Where a person is appointed as "sole selling agent" to sell goods on behalf of his principal, he is entitled to his commission even if the principal himself sells goods of the same description (*W. T. Lamb & Sons v. The Goring Brick Co.* (1932), 173 L.T. 7); but not where he is appointed "sole agent" merely, *e.g.*, for the purpose of selling a house (*Bentall, Horsley & Baldry v. Vicary* (1931), 1 K.B. 253). The distinction is one of construction. "Sole selling agent" is interpreted as meaning the only instrument or means of effecting a sale *at all*. "Sole agent" means the person who alone can sell *as agent*, so that the principal is not precluded from selling on his own behalf. The reason for the distinction appears to be that a mercantile agent has to organise his business in such a way, and incur outlay in so doing, as to enable him to carry out the terms of his sole agency. He may have to employ additional travellers or representatives all over the country, and he should not then be subject to the competition of his principal.

(b) To be indemnified in respect of his Agency.

Every agent has a right to indemnity from his principal against losses, liabilities, and expenses incurred by him in the course of his agency, and he has a right if sued to set off the value of such indemnity against the amount due from him to his principal (*Cropper v. Cook* (1868), 3 C.P. 194).

The right of indemnity is not determined by the death of the principal, but can be sustained against his estate. If the indemnity arises out of a tort committed by the agent within the scope of his authority and with the principal's knowledge or consent, proceedings against the principal's estate

would not be maintainable unless they were pending at the date of death, or the cause of action arose not earlier than six months before the death and the proceedings are taken not later than six months after the personal representative of the principal took out representation (Law Reform (Miscellaneous Provisions) Act, 1934, § 1).

Where the customs and usages in any particular matter are known to the principal, the principal is bound to indemnify the agent against losses incurred when acting within the scope of the agency (*Read v. Anderson* (1884), 13 Q.B.D. 779).

In the case referred to, an agent paid a bet which he had made on behalf of his principal; had he not done so, he would have been posted as a defaulter. [Such transactions are now void in consequence of the Gaming Act, 1892, but the general principle still holds good.]

Even where the custom is illegal, such as the contravention of Leeman's Act, the principal must indemnify the agent if he knew of the custom of contravention (*Seymour v. Bridge* (1885), 14 Q.B.D. 460), but not if he was unaware of the custom (*Coates v. Pacey* (1892), 8 T.L.R. 47, C.A.)

The agent loses his right of indemnity when loss arises by reason of his own default (*Duncan v. Hill* (1873), 8 Ex. 242), but if the act is done by him *bonâ fide* and at the principal's request, the right remains (*Toplis v. Crane* (1838), 5 Bing. N.C. 636).

An agent, as a rule, has no right of action against his principal in respect of any agreement made on the principal's behalf, even though such agent has made himself liable upon the contract to the third party. His remedy is simply by way of indemnity. But insurance brokers may sue their principals for premiums in respect of insurances entered into by them on the principal's behalf.

(c) Lien.

Where goods or chattels are legally obtained by an agent in that capacity, such agent has a particular or general possessory lien for what is due to him from the principal upon such goods (*see* Chap. IX, § 5); provided there is no term in his agreement with the principal inconsistent with such lien, and provided also that the goods do not come into his possession with particular directions, or for some special purpose inconsistent with the lien.

(d) Stoppage in Transitu.

If an agent has made himself personally liable for goods purchased on behalf of his principal, he may exercise the right of stoppage *in transitu*, in the same manner as he could have done if the relationship existing between him and his principal had been that of seller and buyer.

(e) Accounts.

It is the duty of every agent to be ready with proper accounts of moneys received by him in the course of his agency, and if he fails to render such accounts to the principal on request, the latter may compel the agent to perform this duty by an action for an account. There is, however, no corresponding right to an account, residing in the agent as against the principal, unless such an account is necessary to determine the amount due to the agent by way of remuneration.

§ 10.—The Principal and Third Parties.**(a) The Authority of the Agent.**

The authority of the agent, so far as third parties are concerned, extends to any act within the ostensible

scope of his employment, unless he is not authorised to do the act, and the person with whom he is dealing knows that the act is in excess of his authority.

Thus, where a principal entrusted certain deeds to an agent, with authority to pledge them for a certain amount, and the agent pledged them for a larger amount than that authorised, the principal was not entitled to recover the deeds, except upon payment of the full sum advanced, the pledgee having taken them in good faith, and without knowledge of the limitations placed on the agent's powers by the principal (*Brockleby v. Temperance Permanent Building Society* (1895), A.C. 173).

But the principal is not bound where the agent does anything outside the scope of his apparent authority unless the principal had in fact authorised the agent to do it; nor is a principal bound by any act of the agent which is not done as agent on the principal's behalf.

(b) The Liability of the Principal.

The principal, even if he is not disclosed, may sue or be sued in his own name upon any contracts made for him by his agent, and in respect of any moneys paid or received by the agent on his behalf.

If under a written contract an agent contracts in his own name, parol evidence is allowed for the purpose of identifying the real principal, so that he may be charged or may himself sue upon the contract; but any such parol evidence must not be inconsistent with the written agreement, so that if the agent expressly describes himself as a principal, the real principal is unable to bring an action in respect of the contract.

A foreign principal cannot sue or be sued in respect of a contract made in this country by his agent, unless it can be shown, from all the circumstances, that the foreign principal was intended to be the

contracting party, and that the agent had authority to enter into the agreement upon that understanding (*Malcolm v. Hoyle* (1893), 63 L.J. Q.B. 1, C.A.).

A principal cannot sue or be sued in respect of any deed, even though it purports to be executed on his behalf, unless he is described as a party under it, and it is executed in his name (*Chesterfield Colliery Co. v. Hawkins* (1865), 3 H. & C. 677).

An agent to execute a deed for a principal must, as a general rule, be authorised by power-of-attorney (*Berkeley v. Hardy* (1826), 5 B. & C. 355), though apparently, if the execution is done in the presence of the principal, authority may be given by word of mouth (*Rex v. Longnor* (1833), 4 B. & Ad. 647). But if an agent executes a deed in his own name, he becomes personally liable in respect of the contract entered into, even though the deed describes him as acting for a named principal (*Appleton v. Binks* (1804), 5 East 148).

(c) Undisclosed Principal.

(1) *Where the EXISTENCE of the Principal is not disclosed.*

If an agent enters into a contract without disclosing that he is an agent, either the principal or the agent may sue upon it, and the third party, even though at the time of executing the transaction he may have thought he was dealing with the principal, may, upon discovering that the party dealt with was merely an agent, recover from the real principal (*Sims v. Bond* (1838), 5 B. & Ad. 393; *Thomson v. Davenport* (1829), 9 B. & C. 86); but where the third party, after learning who was the real principal, has elected to give exclusive credit to the agent, he is bound

by such election and cannot afterwards sue the principal.

Where a person brings an action on a contract to which he is a party, against the person with whom he has contracted and who is, in fact, an agent, and judgment is given against such agent, the plaintiff cannot subsequently take proceedings on the same contract against the principal, nor can the Court set aside the judgment against the agent (*R.M.K.R.M. v. M.R.M.V.L.* (1926), 95 L.J., (C.P. 197).

If an undisclosed principal, in respect of goods purchased by an agent, is sued for the price of the goods, it will be a good defence for him to plead that credit had been given by the third party to the agent only, and that while such was the state of affairs he had paid the agent.

Where an agent sells for an undisclosed principal, such principal may, nevertheless, sue upon the contract; but the purchaser may in this case plead that the price was paid to the agent before any claim was made by the principal; and he can also show that he believed the agent to be the principal, and thus have the right of set-off against the true principal of any sum owing to him by the agent, before he became aware that such agent was not the principal.

Where, however, the agent definitely describes himself as principal, he alone is entitled to sue (*Humble v. Hunter* (1848), 12 Q.B. 310).

Where a principal leads a third party to believe that his agent, with whom the third party is contracting, is really the principal, the third party is entitled to set off any debt due to him from the agent, against any claim by the principal, so long as the right of set-off had accrued before the third party received notice

that the agent was not a principal. This right of set-off is founded upon the doctrine of estoppel.

This right will arise where a factor sells goods in his own name, and the buyer deals with him as, and believes him to be, the principal (*Borries v. Imperial Ottoman Bank* (1873), L.R. 9, C.P. 38); but the right will not arise where the third party knew the factor was an agent, even though he had no knowledge of the identity of the principal (*Semenza v. Brinsley* (1865), 18 C.B. N.S. 467).

(2) Where the IDENTITY of the Principal is not disclosed.

If a person makes a contract as agent for a principal whose *identity* is not disclosed, the agent is not personally liable to the third party, unless otherwise agreed either expressly, impliedly, or by trade custom. There is a custom of the Stock Exchange that a broker, though he may be only an agent, is personally liable on contracts which he makes for sale or purchase of shares.

If the agent buys, and the seller knew that there was a principal, credit would not be given exclusively to the agent, and it will be no defence to the principal to show that he has paid the agent, unless he can also show that he was led to do so by the conduct of the third party; whilst if the agent sells, and the third party knew that there was a principal, the only defence of the third party is to show that he has actually paid the agent, before demand by the principal, and he has no right of set-off in respect of money due to him from the agent.

(d) Credit given to Agent.

If the agent chooses to make himself personally liable, upon a contract, even though he contracts as

agent, he may be sued upon it, and if judgment is obtained, this will bar proceedings against the principal; for if judgment has been obtained against the agent, it is conclusively presumed in law that the third party has elected to give credit to the agent alone, and this will be so, even although the third party was unaware, when judgment was given, that the agent was not in fact the principal (*Cross v. Mathews* (1904), 91 L.T. 500). If judgment has not been obtained against the agent, it is a question of evidence as to whether or not credit was given exclusively to the agent, and if this cannot be proved, it is no defence by the principal to show that credit was given to the agent, unless he can also show that he paid the agent while credit was so given.

(e) Misrepresentation by Agent.

Fraud, misrepresentation, or non-disclosure by an agent; is a good defence against an action by the principal to the same extent as if it had been committed by the principal himself.

An important case on this point is *Blackburn Low & Co. v. Haslam* ((1888), 21 Q.B.D. 144). In this case the principal instructed his agent to re-insure an overdue ship at a certain rate; the agent was not able to obtain this rate, but received an offer to re-insure at a higher rate. The agent then heard that the vessel was actually lost, and telegraphed in the name of his principal, to the party offering the higher rate, to insure the vessel at that rate. Subsequent to this, and before the insurance was actually effected, the principal and the third party entered into negotiations, the insurance being eventually taken out at a higher rate than that at first quoted by the insurer. It was held that the contract was made through the agent, and as he had not disclosed to the insurer his knowledge of the loss of the ship, his principal could not recover upon the policy.

(f) Torts of Agent.

The principal is liable jointly and severally with the agent for the latter's torts, when the agent is

acting in the ordinary course of his agency, or by the authority of the principal (*Betts v. De Vitre* (1868), 3 Ch. 429), even though he receives no benefit therefrom (*Lloyd v. Grace, Smith & Co.* (1912), A.C. 716); but if the tort is committed outside the ordinary course of the agency, and without the principal's authority, or if the agent when committing a tort is not acting on the principal's behalf, the principal is under no liability (*Rayner v. Mitchell* (1877), 2 C.P.D. 357).

Difficulty is sometimes experienced in determining whether the agent (generally an employee) is acting within the scope of his employment when the wrongful act is committed.

Thus in *Whatman v. Pearson* ((1868), 3 C.P. 422), a master gave strict orders to his workmen not to leave their horses or to go home during the dinner hour. One of them disobeyed these orders and went home to dinner leaving his horse and cart unattended outside his house. The horse bolted and damaged X.'s railings. The master was held liable, as the carter was acting within the general scope of his authority to conduct the horse and cart during the day.

But if the servant were to take out his master's carriage without leave for his own purposes or enjoyment, the employee alone would sustain liability if damage is suffered by a third party as a result thereof.

A City merchant sent a clerk with a carman to deliver certain goods, and in the course of the return journey, the normal route was departed from for some private purpose of the clerk, and in the course of this deviation, a child was knocked down and injured. It was held that the merchant was not responsible (*Storey v. Ashton* (1869), 4 Q.B. 476).

If the agent commits a tortious act as a result of which the principal incurs liability to a third party, the principal is entitled to recover contribution from the agent except in circumstances where the tort was committed with the knowledge of, or under instruction from, the principal (Law Reform (Married Women and Tortfeasors) Act, 1935, § 6 (i) (c)).

The Court has power to direct that the contribution to be recovered from the agent shall amount to a complete indemnity (*ibid.* § 6 (2)). At common law, where the principal was made liable for the consequences of a tort committed by the agent, the principal (unless he had authorised the tort) could recover damages from the agent in respect of the loss resulting from the agent's conduct if the tort had been committed with knowledge of its wrongfulness, or for the agent's own benefit or contrary to the principal's express instructions.

The agent is always liable for a tort committed by him, whether or no liability also attaches to the principal.

§ 11.—Agent and Third Parties.

(a) Liabilities.

It will have been noted that the agent can make himself personally liable upon a contract, but he will not normally incur personal liability if he contracts merely as agent, for the contract is not with him, but with his principal.

But the agent will be personally liable on the contract—

- (1) If he contracts in England on behalf of a principal out of the jurisdiction, the Court being ready to infer that the agent undertakes a personal liability, unless the terms of the contract show clearly that it was intended that the true principal should be liable.
- (2) If he executes a deed in his own name.
- (3) If, though purporting to act as agent, he is actually contracting on his own behalf, or if there is no principal in existence who can and

does take over the liabilities of the contract by ratification or otherwise.

- (4) If he signs a bill of exchange in his own name.
- (5) If he is acting as an officer of the Court, *e.g.*, as Receiver.

(b) Breach of Warranty of Authority.

Where an agent purports to act as agent on behalf of a principal who is in existence, and induces another to enter into a contract when he had in fact no authority to do so, the alleged principal is under no liability on the contract, nor is the person who purports to act as agent ; but the injured party may sue the professing agent for breach of warranty of authority (*Collen v. Wright* (1856), 7 E. & B. 301).

Thus in *Starkey v. Bank of England* ((1903), A.C. 114), a broker forwarded to the Bank of England a power-of-attorney, purporting to be signed by the owner, for the transfer of certain Consols. The broker believed that the power had been duly executed, but in fact the signature of the holder had been forged. It was held by the House of Lords that the broker had impliedly warranted that he had the authority he professed and that he was liable to the Bank for breach of that warranty.

Liability for breach of warranty will also attach to the agent who contracts on behalf of a principal who has died prior to the date of the contract, even though the former was unaware of the fact, for the principal being dead, the agent's authority has terminated. The position is the same if the principal becomes insane (*Yonge v. Toynbee* (1910), 1 K.B. 215), unless the principal is liable under the doctrine of estoppel (*Drew v. Nunn* (1879), 4 Q.B.D. 661).

If the agent knew that he had no authority, he is liable in an action of deceit (*Oxenham v. Smythe* (1861), 31 L.J. Ex. 110 ; *Randall v. Trimen* (1856), 25 L.J. C.P. 307).

(c) Rights of Agent.

Where the agent contracts personally, he may sue in his own name upon the contracts entered into by him, if he has an interest in or lien upon the subject-matter. This right will be lost if the principal himself intervenes; and if the agent has no interest in or lien upon the property, a settlement with the principal will be a good defence against the agent.

§ 12.—Determination of Agency.

An agency may be determined by—

- (a) Completion of the transaction for which the agency was formed.
- (b) Destruction of the subject-matter.
- (c) The death or insanity of the principal or agent, or in certain cases by the principal or agent becoming an alien enemy.
- (d) The bankruptcy of the principal.
- (e) Revocation by the principal.
- (f) Renunciation of the agent.
- (g) Effluxion of time.
- (h) Agreement of the parties.

If the principal or agent becomes an alien enemy, and the continuance of the contract is contrary to public policy, the agency is dissolved (*Tingley v. Muller* (1917), 2 Ch. 144, C.A., and see Chap. 1, § 7).

In the case of the bankruptcy of the principal, the authority of the agent is revoked as from the commencement of the bankruptcy; but where neither the agent nor the third party had notice of the act of bankruptcy, and the transaction is completed before the receiving order, both the agent and the third party will be protected (Bankruptcy Act, 1914, § 45).

Revocation by the principal, or renunciation by the agent, must be carried out in accordance with the

terms of the contract ; otherwise a right of action for breach of contract will arise.

When an agency is determined, it is always wise for the principal to give notice to the parties with whom the agent has had dealings, as otherwise he may be liable upon contracts entered into by the agent purporting to be on his behalf after such determination.

§ 13.—Special Classes of Agents.

(a) Factors.

A *factor* is a mercantile agent, whose ordinary course of business is to sell or dispose of goods with the *possession* or *control* of which he is entrusted by his principal (*Baring v. Corrie* (1818), 2 B. & Ald. 137).

Under the Factors Act, referred to in the next paragraph, a *mercantile agent* is defined as a mercantile agent (an unfortunate repetition of term) having in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods (§ 1).

Under the Factors Act, 1889, various statutes relating to factors were repealed and re-enacted for the purpose of consolidation. The principal provisions are as follows :—

(1) *As to Disposition of Goods.*

If the mercantile agent is in possession of goods or the documents of title thereto with the consent of the owner, he may effect a valid sale, pledge, or other disposition of such goods in the ordinary course of his business, and such power also exists even where the consent of the owner has determined, provided in all cases that the third party acts in good faith and without knowledge of a want of, or determination of, authority.

The consent of the owner is to be presumed in the absence of evidence to the contrary (§ 2).

(2) *As to the effect of Pledges.*

The expression "pledge" includes any contract pledging or giving a lien or security on, goods, whether in consideration of an original advance or of any pecuniary liability (§ 1).

A pledge of documents of title shall be deemed to be a pledge of the goods (§ 3).

Where the pledge has been given for an antecedent debt due from the pledgor to the pledgee, the latter acquires no further right to the goods than could have been enforced by the pledgor at the time of the pledge (§ 4).

The consideration for the sale or pledge need not be in the form of cash but may consist of the delivery or transfer of other goods or of documents of title thereto or of negotiable securities, but in such cases the pledgee acquires no right or interest in the goods so pledged in excess of the value of the goods, documents or security when so delivered or transferred in exchange (§ 5).

(3) *As to Consignors and Consignees.*

Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person (§ 7).

A factor has a lien on goods that have come to him in his capacity as such, for the balance of his charges ; and such lien extends to the proceeds of the sale of such goods (*Drinkwater v. Goodwin* (1775), Cowp. 251). But he will lose the lien upon delivery of the goods to the owner (*Kruger v. Willcox* (1754), AmbL. 252) ; though he does not lose it on account of the right of set-off which the third party may have against his principal (*Drinkwater v. Goodwin*, *supra*).

Where the terms upon which a mercantile agent receives goods are inconsistent with the statutory power to pledge, a pledgee without notice can nevertheless acquire a good title to property pledged by such agent (*Weiner v. Harris* (1910), 1 K.B. 285).

(b) Brokers.

A *broker* is an agent employed to make bargains and contracts of a mercantile character between other parties, for a commission commonly called brokerage.

Brokers are not subject to the provisions of the Factors Act ; and are distinguishable from factors to the extent that *they do not have possession of the goods* (*Stevens v. Biller* (1883), 25 Ch. D. 31) ; and also the factor may sell in his own name, whereas the broker can merely sell in the name of his principal (*Baring v. Corrie* (1818), 2 B. & Ald. 137).

The broker, upon making a contract, enters the terms of it in his book, and sends particulars to both the buyer and the seller. The particulars sent to the buyer are contained in what is known as the Bought Note, and particulars sent to the seller are contained in what is known as the Sold Note. If these notes agree they will, according to *Thornton v. Meux* ((1827), M. & M. 43), constitute the contract ; though strictly, the entry in the broker's book is the real evidence of

the contract, and must be resorted to if there is any difference between the Bought and Sold Notes (*Heyman v. Neale* (1809), 2 Camp. 337; *Sievwright v. Archibald* (1851), 20 L.J. Q.B. 529).

If a broker is known to be contracting as such, he does not incur liability, even though the name of the principal be not disclosed (*Southwell v. Bowditch* (1876), 1 C.P.D. 374), but he may make himself liable by contract, express or implied, OR BY CUSTOM.

(1) *Stockbrokers.*

Members of the London Stock Exchange have to declare whether it is their intention to act as brokers or jobbers. A stockjobber is one who buys and sells on his own behalf, but a stockbroker is one who buys and sells on behalf of a principal.

Where a broker is employed by a client, the client is presumed to give him such authority as will enable him to comply with the rules and regulations of the Stock Exchange, and with any reasonable custom. It does not matter whether or not the client is acquainted with the rules of such Exchange (*Sutton v. Tatham* (1839), 10 A. & E. 27); but as to the effect of non-compliance with a statutory enactment, owing to an unreasonable custom of the Exchange, e.g., a contravention of Leeman's Act, see Chap. II, § 9 (b).

By the custom of the Stock Exchange the broker is always liable to pay for shares which he purchases and to deliver the shares he sells on behalf of a client, and the client being the true principal is bound to indemnify him.

Hitchens Harrison Woolston & Co. v. Jackson & Sons ((1943), A.C. 266).

A firm of solicitors, acting as principals, instructed a firm of stockbrokers to sell stock. The brokers sold the stock, but

the owner of the stock instructed the Company not to register the transfer. The brokers thereupon bought a similar holding of stock elsewhere, and sued the solicitors to recover their expenses of so doing.

Held : The solicitors had failed in their duty to deliver a transfer executed by a transferor who was, and would continue to be, ready and willing that the transfer should be registered, and they were liable as principals to indemnify the brokers.

Although the stockbroker may put through the dealings on behalf of several clients in one transaction, dividing the same up in his own books, a contract between such clients and the jobber with whom the transaction was entered into will be established by the custom of the Exchange (*Scott v. Godfrey* (1901), 2 K.B. 726).

(2) Insurance Brokers.

An insurance broker is an agent employed to arrange a contract of insurance with an underwriter on behalf of his principal. The broker is merely an agent in arranging the insurance, but he is a principal for the purpose of receiving payment of the money due from the assured, and of paying it to the underwriter (*Power v. Butcher* (1829), 10 B. & C. 329-340).

He has a lien on the policy for the balance due under the policy (*Fisher v. Smith* (1878), 4 App. Cas. 1; Marine Insurance Act, 1906, § 53 (2)).

The underwriter cannot sue the assured for the premium; but the assured can sue the underwriter in the event of a claim.

(c) Bankers.

The relationship existing between a banker and his customer is normally that of debtor and creditor (*Robarts v. Tucker* (1851), 16 Q.B. 560). The banker is the debtor so long as the money of the customer

remains in his hands, but if the account becomes overdrawn the customer is the debtor.

The customer, however, has a right of ordering the banker to pay money by means of cheques drawn on him to the extent to which his account is in credit at the time, and the bank may therefore be regarded as an agent for this purpose. A similar relationship exists in connection with collecting the proceeds of cheques, bills, etc., on behalf of a customer. The banker has a general lien on all property lodged with him for the purpose of securing the customer's indebtedness, unless there be an express or implied contract inconsistent with such lien. This lien does not attach to the property of persons other than the customer, or to securities of a customer known to the bankers to be affected by a trust (*Cuthbert v. Robarts, Lubbock & Co.* (1909), 25 T.L.R. 583), nor to securities lodged by the customer for safe custody only.

(d) Auctioneers.

An auctioneer is a person authorised to sell goods or land at a public auction or sale. The method of dealing is for the auctioneer to offer specified goods or property, and to sell it on behalf of his principal to the highest bidder. Primarily he is the agent of the seller, but after the property has been knocked down to the highest bidder he is also the agent of the buyer, and by his signature he can bind both parties in order to bring into existence the memorandum necessary under § 4 of the Sale of Goods Act, 1893, or § 40 of the Law of Property Act, 1925.

• There must, however, be no undue delay, otherwise the agency will be deemed to have terminated. As

to what constitutes undue delay was considered in *Chancy v. Macklow* ((1929), 1 Ch. 461), where the purchaser, immediately after the auction, objected to one of the conditions of sale, and left without signing the memorandum. The auctioneer, being of the opinion that the purchaser would sign later, returned to his office, and as the purchaser did not appear, signed the memorandum on his behalf two hours later. It was held that the purchaser was bound thereby.

An auctioneer should only sell for cash ; but where it is customary to accept a negotiable instrument, he may do so if he acts without negligence (*Farrer v. Lacey* (1885), 31 Ch. D. 42).

He has a lien on the goods to the extent of his charges while they are in his possession (*Williams v. Mullington* (1788), 1 H. Bl. 84).

The provisions of the Sale of Goods Act, 1893, as to auction sales are as follows :—

- (1) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale.
- (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid.
- (3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself, or to employ any person to bid at such sale, or for the auctioneer, knowingly, to take any bid from the seller or any such person.

Any sale contravening this rule may be treated as fraudulent by the buyer.

- (4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction (§ 58).

It has been decided that in a sale by auction, where the goods are known to be subject to a reserve price, if the auctioneer should by mistake knock down a lot, under the impression that the reserve price has been reached, when this is not the case, he can revoke, even after the fall of the hammer; because each bid was a conditional offer, subject to the price offered reaching the reserve price, and the fall of the hammer was an acceptance subject to the reserve price being reached (*McManus v. Fortescue and Branson* (1907), 2 K.B. 1). But if in such a case the auctioneer actually signs a memorandum of the contract, the acceptance ceases to be conditional, and he will be liable to an action for breach of warranty of authority at the suit of the purchaser if he sells below the reserve price (*Fay v. Miller, Wilkins & Co.* (1941), Ch. 360).

An advertisement by an auctioneer of a sale by auction, is not of the nature of a contract to sell, and the auctioneer will not be liable in damages if the auction does not take place, for loss of time and expenses of a person who attended with a view to effecting a bid (*Harris v. Nickerson* (1873), 8 Q.B. 286).

An auctioneer has no implied authority to warrant the goods sold by him (*Payne v. Leconfield* (1882),

51 L.J. Q.B. 642); nor does he warrant the principal's right to sell in the case of specific goods, but he must not be aware of any defect in the seller's title (*Benton v. Campbell, Parker & Co. Ltd.* (1925), 2 K.B. 410).

In this case, X. obtained a car from Z. under a hire-purchase agreement, and before all the instalments had been paid, persuaded D., an auctioneer, to sell the car by public auction. P. purchased the car at the auction and resold it to Y., who was eventually compelled to give it up to Z. the true owner. Y. claimed compensation from P. who in turn sued D. the auctioneer, but unsuccessfully on the above-mentioned grounds.

To prevent a continuance of the "knock out" practice at auctions, it is an offence punishable by a fine not exceeding £100 and/or imprisonment for a term not exceeding six months, for any dealer to give or agree to give any consideration to another person as an inducement to him to abstain from bidding at a sale by auction; and similar penalties are liable to be incurred by the recipient of such gift (Auctions (Bidding Agreements) Act, 1927). For the purposes of the Act, a dealer is defined as "a person who in the normal course of his business attends sales by auction for the purpose of purchasing goods with a view to reselling them."

Where any sale has been effected as a result of such practice, and a prosecution and conviction has resulted therefrom, it may be treated by the vendor, as against a purchaser who has been a party to the agreement or transaction, as a sale induced by fraud.

A notice or intimation by the vendor to the auctioneer that he intends to exercise such power, shall not affect the obligation of the latter to deliver the goods to the purchaser (*ibid.*).

It is a well-known fact that in an ordinary auction sale the bids gradually rise from a low figure to a

high figure, and it is the highest bidder amongst the various competitors to whom the property is sold. In a Dutch auction, however, this procedure is reversed, the article being put forward by the selling agent at a certain figure, which he gradually lowers until he reaches a figure at which some person agrees to buy. The important difference between these two modes of procedure is that for an ordinary auction sale the agent must be a licensed auctioneer, and is required to pay a duty of £10 per annum, whereas for the conduct of a Dutch auction no license is necessary.

Various statutory Rules and Orders are in existence regulating auction sales and prices under emergency legislation passed during the recent war.

(e) Partners.

Under the Partnership Act, 1890, every partner is deemed to be the agent of the firm and of his other partners for the purpose of the business of the partnership; and the acts of every partner performed in the usual way of business and of the kind carried on by the firm of which he is a member, will bind the firm and his partners, unless the partner so acting has, in fact, no authority to act for the firm in a particular manner, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner (§ 5).

The implied power of a partner only extends to what is necessary for the usual conduct of the partnership business, and it does not extend to the execution of deeds, even though the partnership agreement is itself under seal. For this purpose specific authority under seal must be given (*Harrison v. Jackson* (1797), 7 T.R. 207).

Where a partner pledges the credit of a firm for a purpose apparently not connected with the firm's ordinary business, the firm is not bound, unless such partner is in fact specially authorised by the other partners (§ 7).

If the partners agree that a restriction shall be placed upon the powers of one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement (§ 8).

A partner is entitled to appoint an agent for the purpose of the examination of the books of the firm (*Bevan v. Webb* (1901), 2 Ch. 59).

The peculiarity of partnership agency lies in the fact that every partner is both a principal and an agent. As agent he may bind the firm, either under an implied authority or express power; and as principal he is jointly liable with his partners for any of the firm's obligations arising out of the contract. A limited partner has no power to bind the firm (Limited Partnerships Act, 1907, § 6).

(f) Married Women.

A married woman has no authority by the mere fact of marriage to contract on behalf of her husband, but in certain cases an authority to pledge the credit of her husband for necessities is presumed until the contrary is proved. This implied authority arises partly from the duty of the husband to provide her with the necessities of life, and partly from the position in which the husband places her in respect of housekeeping matters, but it is strictly confined to the provision of necessities for herself and her

household, and she has no power to borrow money in his name; and the presumption of authority to pledge his credit may also be rebutted by showing that she was already properly provided with necessaries, and that she had no authority in fact.

Thus, if the husband's credit is pledged by the wife, and he can show that he had actually forbidden her to pledge his credit, he is under no liability, even though the person dealing with the wife had no notice of the want of authority; unless the husband himself, in spite of the other circumstances, had invested her with an appearance of authority, or had done some act which estopped him from denying her authority (*Remington v. Broadwood* (1902), 18 T.L.R. 270, C.A.).

The word "necessaries" signifies articles which are reasonably needed, and which are suitable to the station in life and the style of living fixed by the husband.

It has been held that costs incurred by a wife in bringing proceedings for divorce against her husband are "necessaries" for which the husband is liable (*Abrahams v. Hoffe-Miles* (1923), 40 T.L.R. 2).

If, however, the husband forbids the wife to pledge his credit, he must make her an allowance for necessaries, or keep her fully supplied with them; and the mere fact that the wife has a separate income, however large, does not of itself exonerate the husband from the obligation to provide her with necessaries (*Callot v. Nash* (1923), 39 T.L.R. 291). An agency of necessity will also arise where the husband has deserted his wife without adequate cause, and has failed to provide her with the means to purchase

necessaries ; in such cases the husband cannot revoke the wife's authority to pledge his credit for such necessaries.

With this exception, a wife *prima facie* has no authority to pledge her husband's credit if they are living apart, and in such a case, before giving credit, a tradesman should ascertain whether the circumstances of the separation are such that she has implied power to do so.

A husband is not liable if the wife pledges his credit after judicial separation, unless he has failed to pay alimony that has been ordered, in which case he would be liable for necessaries.

Advertisements are sometimes inserted in newspapers by which a husband repudiates liability for his wife's debts ; such advertisements are either unnecessary or insufficient. If the wife has not already been in the habit of pledging the credit of the husband they are unnecessary, since the husband can privately forbid the wife to pledge his credit, and keep her fully supplied. If the wife has already been in the habit of pledging the husband's credit, with his consent, the advertisements are insufficient, since specific notice must be given to the persons with whom she has been in the habit of dealing. If it could be proved that the advertisement had come to the knowledge of a particular trader, this would be regarded as sufficient notice and the husband would not be liable in respect of his wife's subsequent transactions with that trader (*Hunt v. De Blaquiere* (1829), 5 Bing. 550).

(g) Children.

No agency is created for the benefit of children by the mere fact of parentage, and a father is not liable

for debts incurred without his authority by his children ; and although a father is liable for the maintenance of his children, this does not provide any legal foundation for the assumption that he will pay for necessities supplied to them. If then a child under age orders goods without authority, the remedy not being against the father is against the child, and will only be enforceable if the goods supplied were actually necessities.

SYNOPSIS OF CHAPTER III

THE SALE OF GOODS

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CHAPTER III

THE SALE OF GOODS

§ 1.—The Contract of Sale of Goods.

(a) The Contract defined.

A contract of sale is defined by § 1 of the Sale of Goods Act, 1893, as being “a contract whereby the seller transfers, or agrees to transfer, the property in goods to a buyer, for a money consideration called the price.”

“Property” means the right of ownership, and is defined by the Act as being the “general” property, i.e., a right which is good against all the world.

“Goods” include all chattels personal other than things in action and money. The term also includes emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale (§ 62). A ship is also “goods” within the meaning of the Act (*Behnke v. Bede Shipping Co.* (1927), 163 L.T.J. 91).

“Future Goods” mean goods to be manufactured or acquired by the seller after the making of the contract of sale (§ 62).

An agreement to sell is a contract in which the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled. Such an agreement is an *executory* contract, which does not pass any right to the thing agreed to be sold enforceable by an action, but only to a remedy, upon breach, by action for damages. This

agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled, subject to which the property in the goods is to be transferred.

Thus A. agreed to sell a horse to B., upon the terms that B. should take it away, and try it for eight days, and then return it if he should not think it suitable for his purposes. The horse died within three days without the fault of either party. A. could not maintain an action for the price (*Elphick v. Barnes* (1880), 5 C.P.D. 821).

(b) Capacity to Contract.

The capacity to buy and sell is stated by § 2 to be regulated by the law concerning capacity to contract, which is dealt with in Chapter I, § 7.

Section 2 of the Act specially provides that where necessaries are sold and delivered to an infant or person who by mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price. By the Infants' Relief Act, 1874, sales to infants, except for necessaries, are void, and incapable of ratification after full age. If the infant has paid the price for necessaries he cannot recover; in other cases he can only recover money paid where he has received no benefit whatever (*Hamilton v. Vaughan Sherrin Electrical Engineering Co.* (1894), 3 Ch. 594).

What are necessaries, and what is a reasonable price are questions of fact; and the section states that the term "necessaries" means goods suitable to the condition of life of such infant or other person, and to his actual requirements at the time of sale and delivery.

(c) The form of the Contract.

A contract of sale may be in writing, either with or without seal, or by word of mouth, or partly in writing and partly by word of mouth, or may be

implied from the conduct of the parties (§ 3). This last method of forming a contract was established in *Brogden v. Metropolitan Rly. Co.* ((1877), 2 App. Cas. 666, H.L.), which recognised that “a course of dealing may exist which creates a right on the one side to give the order, and on the other side an obligation to comply with the order.”

Section 3 expressly provides that nothing therein shall affect the law relating to corporations, as to which see Chapter I, § 6 (*d*), and the section is subject to the limitations imposed by § 4 of the Act.

(d) The Provisions of § 4 of the Sale of Goods Act, 1893.

Section 4 (1) (formerly § 17 of the Statute of Frauds) provides that a contract for the sale of goods OF THE VALUE OF £10 OR UPWARDS shall not be enforceable by action unless—

- (1) the buyer shall accept part of the goods so sold, and actually receive the same, or
- (2) gives something in earnest to bind the contract, or
- (3) makes part payment, or
- (4) where the party to be charged gives some note or memorandum in writing of the contract, signed by him, or his agent in that behalf.

The effect of this section is to provide protection both to sellers and buyers in the event of a repudiation of a contract already entered into. It will be noted that the provisions are alternative. There is no statutory provision with regard to a sale of goods of the value of *under* £10; as to whether a contract has been entered into in such cases is a matter of fact to be proved by the evidence available.

Section 4 (3) declares that there is an acceptance of goods within the meaning of subsection (1) when THE BUYER DOES ANY ACT IN RELATION TO THE GOODS WHICH RECOGNISES A PRE-EXISTING CONTRACT OF SALE, WHETHER THERE BE AN ACCEPTANCE IN PERFORMANCE OF THE CONTRACT OR NOT.

The meaning of *acceptance* and *actual receipt* of part of the goods was dealt with by the Court of Appeal in *Abbott & Co. v. Wolsey* ((1895), 2 Q.B. 97, C.A.). This action was brought to recover damages for non-acceptance of hay alleged to have been sold by the plaintiffs to the defendant. The facts were as follows :—

The plaintiffs verbally sold some hay to the defendant, to be delivered at his wharf, "barge to be alongside on or before 21st July, 1894, or order cancelled." The barge was not alongside the wharf by that date, and on 4th August the plaintiffs sent a messenger to ask the defendant whether he would then accept the hay, and the defendant agreed to do so if the barge was alongside his wharf by 8th August. The barge was alongside on that day, and the plaintiffs' lighterman handed to the defendant's servant a receiving note for the hay, which was not returned. The defendant came on to the barge, and, after taking a sample of the hay and examining it, said, "The hay is not to my sample, and I will not have it." On these facts it was held that the requirements of the section as to acceptance and receipt had been satisfied.

The provision as to actual receipt is interpreted very liberally. It is not necessary that the whole of the goods need be received (*Scott v. Eastern Counties Railway* (1843), 12 M. & W. 33); even the receipt of a sample may be sufficient (*Hinde v. Whitehouse* (1806), 7 East 558). But there must be some semblance of receipt. In *Golfing Amusements, Ltd. v. Everard and Ellis* ((1931), 75 S.J. 330), a contract

for the sale of goods of the value of more than £10 was entered into verbally, and the sellers, at the request of the buyers, made certain alterations in the goods ordered; there was no actual receipt, and the contract was therefore unenforceable.

It is important to note that the term "acceptance" in § 4 is used in a different sense from that in which it is used in § 35. Under the latter section, the buyer is deemed to have accepted the goods when—

- (1) he intimates to the seller that he has accepted them, or
- (2) the goods have been delivered to him and he does any act in relation to them inconsistent with the ownership of the seller, or
- (3) after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

This section provides for the loss of the right of rejection, and whilst there may be receipt sufficient to satisfy the provisions of § 4 and thus prevent the parties from denying the EXISTENCE OF THE CONTRACT ITSELF, there might not be sufficient acceptance whereby the buyer has lost the right of rejection. Although conformity with the conditions laid down in § 35 will render the buyer liable to pay for the goods, it does not follow that he is deprived thereby of any remedy by way of damages or counter-claim should the goods not be in accordance with the contract.

Something given in earnest is something of any value given by the buyer in recognition of the contract, and being other than part payment, such as a cheque which was dishonoured upon presentment.

The question of part payment was raised in *Norton v. Davidson* ((1889), 1 Q.B. 401, C.A.). There the

defendant ordered twelve cabinets at £4 7s. 6d. each. The plaintiffs asked for something on account, but the defendant pointed out that he had overpaid them £1 on a previous order, and it was then agreed between them that this sum of £1, which the plaintiffs had already received, should be appropriated to the new order, and dealt with as part payment of the price of the cabinets. Eventually the defendant refused to take the cabinets, and set up § 4 as a defence to an action against him. The defence proved successful, the Court, following *Walker v. Nussey* ((1847), 16 M. & W. 302), holding that there was no part payment to satisfy the statute. The so-called part payment was a term of the oral contract itself, and not something in addition to and outside it, nor had the position of the parties been altered by the transference of an item from one account to another.

If a cheque is sent by post to satisfy the section, and the seller immediately upon receiving the same returns it, repudiating the contract, there is no part payment. The post office in such a case is not the agent of the seller (*Davies v. Phillips, Mills & Co.* (1908), 24 T.L.R. 4). On the other hand, when the cheque which the buyer sent was retained by the seller, even though it was returned in the course of a few days there was held to have been part payment (*Parker v. Crisp & Co.* (1919), 1 K.B. 481).

The requisites of the memorandum forming one of the alternatives under § 4 will be found dealt with in Chapter I, § 6 (e) and (f). Since the memorandum requires only to be signed by the party to be charged, it follows that one party may be bound whilst the other is not, unless the existence of one of the

other factors can be proved. Should the contract be varied by the incorporation of other terms, the variation must itself comply with the section, for it is to be regarded as a new contract; but not where the variation is made merely for the convenience of the parties and the original contract substantially remains unaffected. The contract is then enforceable even though the variation is not expressed in writing (*Bessler, Waechter and Glover & Co. v. South Derwent Coal Co.* (1937), 4 A.E.R. 552).

If the memorandum is signed by an agent, he must have the necessary authority. An auctioneer is deemed to be the agent for the buyer upon the fall of the hammer, but where he sells by private treaty, he is the agent of the seller only (*Mews v. Carr* (1856), 26 L.J. Ex. 39).

Where the auctioneer's name appears only in print on the catalogue which is incorporated into the auctioneer's book, but which is authenticated by the auctioneer writing down, opposite the number of the lot in question, the price and the purchaser's name, it was held that this constituted a sufficient memorandum in writing to bind the parties (*Cohen v. Roche* (1927), 42 T.L.R. 674).

A solicitor who is instructed to deny a contract is not an agent within the meaning of the section, nor is it a sufficient "note or memorandum" if an agent by letter, refers to other letters with a denial that they contain the terms of the contract (*Thirkell v. Cambi* (1919), 35 T.L.R. 652, C.A.).

It should be noticed that in the absence of a written memorandum, even though one of the alternatives provided for by § 4 of the Sale of Goods Act

has been satisfied, if the contract is one not to be performed within a year, as for instance where the goods are to be supplied over more than a year, the contract becomes unenforceable under § 4 of the Statute of Frauds (*Prested Miners' Gas, &c., Co., Ltd. v. Henry Garner* (1910), 26 T.L.R. 644).

It must be remembered that the section does *not* apply to a CONTRACT FOR WORK (*Clay v. Yates*, 1 H. & N. 73). But if the contract contemplates the ultimate transfer of the property in a chattel for a price, then it is a contract for sale of goods, and the section applies (*Lee v. Griffin* (1861), 30 L.J. Q.B. 252).

It is sometimes difficult to distinguish between a contract for the sale of goods and one for *work or labour*, inasmuch as the resultant chattel might involve both the provision of materials and labour. In the leading case of *Lee v. Griffin* (*supra*), the following factors were held to determine the position :—

- (1) If the contract be such that when carried out it would result in the sale of a chattel, the party cannot sue for work and labour, and
- (2) If the contract be such that when carried out it would result in transferring for the price, from one person to another, a chattel in which the latter *had no previous property*, it is a contract for the sale of goods.

It would appear, however, that where the execution of the contract demanded particular skill (*e.g.*, the painting of a portrait by a well-known artist), the contract would be one for work and labour since the materials supplied were merely incidental and only necessary for the exhibition of the skill of the painter

(*Robinson v. Graves* (1935), 1 K.B. 579), but *semble* if the contract had been for the *sale* of a picture painted by a third party, the picture would constitute a chattel and the enforceability of the contract (where the requirements of § 4 were not satisfied) would be determined by the decision in *Lee v. Griffin*.

(e) Contract for future Goods.

Section 5 provides that the contract of sale may be one for the sale either of existing or of future goods, future goods being those which are to be manufactured or acquired after the making of the contract of sale; and in subsection (2) is embodied the decision in *Hibblewhite v. M' Morine* ((1839), 5 M. & W. 466), that there may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(f) Perishing of the Goods.

Section 6 deals with a contract for the sale of specific goods, and provides that where the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void.

Such provision would also apply where it is impossible to give delivery on account of the misappropriation of the goods by a third party.

In August, 1927, A. had deposited 4,900 bags of ground nuts at a London wharf. He sold 700 bags to B. who, without taking possession, resold them as lying at the warehouse to C. When C. claimed delivery, it was found that owing to the dishonesty of someone, there were only 150 bags available. C. refused payment, and, as the Wharf Company were insolvent, B. brought an action against C. for the price. Decision was given in C.'s favour, and B. then sued A. to recover the amount from them as the original seller of the goods. It was held that at the time when the supposed contract between A. and B. was entered into, there was no lot

of 700 bags in existence and that consequently there was no contract. B. was thus able to recover (*Barron, Lane and Ballard, Ltd. v. Gilbert J. McCaule & Co* (1929), 1 K.B. 374).

Section 7 provides that where there is an agreement to sell specific goods, and without any fault on the part of either the seller or the buyer such goods subsequently perish before the risk passes to the buyer, the agreement is avoided.

By § 62 "specific goods" means goods identified and agreed upon at the time a contract of sale is made ; and as we have seen, by § 1 a "contract of sale" includes an agreement to sell, as well as a sale. If the sale is one of generic goods, *i.e.*, goods of a general description, the seller is not relieved from responsibility should the goods which he had intended for delivery turn out to be non-existent or otherwise unavailable. It would be for him to secure other goods of a like description for delivery to the buyer.

(g) The Price.

The price to be paid may actually be fixed in the contract, or may be left to be fixed in a manner thereby agreed, or may be determined by the course of dealing between the parties ; otherwise the buyer must pay a reasonable price, and what is a reasonable price is a question of fact dependent on the circumstances of each particular case (§ 8).

If the terms of the contract provide that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make the valuation, the agreement is avoided ; but if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor (§ 9 (1)) ; and if the valuation is impossible, owing to the fault of one of the contracting parties, the party not in fault may maintain an action for damages

against the party in fault (§ 9 (2)). The price must be a money price, otherwise the contract is a barter and not a sale. Apart from the fact that the consideration (price) must be in money, the general rules as to consideration apply, and the price need not be adequate for the contract to be enforceable. There may be circumstances when at a time of national crisis, price-fixing may be regulated by the State under emergency powers. It is quite competent for a manufacturer or wholesaler to stipulate that goods supplied to a retailer are not to be sold by him below a stated price (*Elliman v. Carrington* (1901), 2 Ch. 275; *Palmolive Co. (of England), Ltd. v. Freedman* (1928), Ch. 264).

(h) Conditions and Warranties.

Apart from the statute, the maxim of *Caveat Emptor* (let the buyer take care) applies, and conditions and warranties are not implied.

We have already attempted to show the distinction between conditions and warranties, and the meaning of these terms (*see* p. 93 *ante*), and it is of interest to note that the Act contains a definition of "warranty," but not of "condition." WARRANTY is defined as an agreement with reference to goods which are the subject of a contract of sale, but *collateral to the main purpose* of such contract, the breach of which gives right to a claim for *damages* but not to a right to reject the goods and treat the contract as repudiated (§ 62). By necessary inference a CONDITION is a term of a contract but for which the party would not have entered into the contract; so that the breach of the condition will entitle the injured party to *repudiate* the contract.

Whether a stipulation is a condition or a warranty depends in each case on the construction of the contract (§ 11 (1) (b)). In *Behn v. Burness* ((1863), 32 L.J. Q.B. 204 Ex. Ch.), a charter-party was made in relation to a ship described in the charter as then "in the port of Amsterdam." It was held that this statement was intended to be a substantive part of the contract, and therefore the contract could be repudiated if it were not true. Stipulations as to time of payment are not, in the absence of agreement, of the essence of a contract of sale (§ 10), but in a mercantile contract, time, not being time of payment, is of the essence of a contract (*Reuter v. Sala* (1879), 4 C.P.D. 246, 249, C.A.). If the condition had to be performed by the seller, the buyer has the option of waiving the condition, or may elect to treat a breach of it as a breach of warranty, and not as a ground for the rescission (§ 11 (1) (a)). If the contract is not severable, and the buyer has accepted any part of the goods, or where it is for specific goods the property in which has passed to the buyer, then, unless otherwise agreed, breach of condition on the part of the seller can only be treated as a breach of warranty, and not as a ground for repudiating the contract (§ 11 (1) (c)).

Thus, A. agreed to buy certain ear-marked bales of wool from B., to arrive by ship, guaranteed about similar to samples, any disputes to be decided by the selling brokers. The wool turned out not similar to samples, and the brokers allowed an abatement, but A. could not reject it for inferiority (*Heyworth v. Hutchinson* (1867), L.R. 2 Q.B. 447).

Warranties or conditions may be express or implied. Express warranties or conditions are those definitely entered into at the time the contract is made, or subsequently; if they are made subsequent to the contract itself, they must be under seal, or for

further valuable consideration if they are to give ground to an action, since they will then form a new contract.

Implied conditions or warranties are those which attach to the contract by custom or by implication of law. These can only be negated by an express contract to that effect, or by a custom inconsistent with such implied warranty and well known, or by an express warranty inconsistent with the implied warranty.

Where a dealer puts up in his shop a notice that no warranties of any kind are given, this only means that no express warranties are given, and such a notice will not free the dealer from liability under an implied warranty.

Under the Sale of Goods Act, the following CONDITIONS are implied unless the terms of the contract reveal a different intention :—

- (1) A condition that the seller has a **RIGHT TO SELL** the goods, or in the case of an agreement to sell that he will have a right to sell at the time when the property is to pass (§ 12 (1)).

When, without the knowledge of the buyer and of the seller, goods are labelled in such a way that they cannot, in their then condition, be re-sold without infringing the trade-mark of a third party, the buyer will be entitled to reject the goods, as the seller has broken the implied condition contained in § 12 (1) that they had a right to sell the goods. The goods as labelled were not of merchantable quality, and it was also considered by one of the Judges that the warranty of quiet possession had been broken (*Niblett, Ltd. v. The Confectioners' Materials Co., Ltd.* (1920), 37 T.L.R. 653, C.A.).

- (2) When a sale is by **SAMPLE** there are three implied conditions, *viz.*,

- (1) that the bulk shall correspond with the sample in quality ;

- (2) that the buyer shall have a reasonable opportunity for comparing the bulk with the sample ; and
- (3) that the goods shall be free from defect rendering them unmerchantable, which would not be apparent on a reasonable examination of the sample (§ 15 (2)).

A. ordered from a manufacturer a quantity of worsted coatings, weight and quality equal to sample ; the coatings were equal to sample, but were unmerchantable owing to being "slippery," this defect not being apparent on a reasonable examination of the sample. A. was allowed to reject the goods (*Drummond v. Van Ingen* (1887), 12 App. Cas. 284).

Where part of the goods sold by sample is in accordance with the sample, the other part having some defect, the buyer can elect either to reject the whole or to accept the whole, claiming damages in respect of the defective goods ; but he is not entitled to accept part of the goods and reject the remainder. He must decide whether he will regard the breach as one of condition or as one of warranty unless the contract is severable (*Aitken v. Boulton* (1908), 10 F. 490, Ch. of Sess.).

- (3) In sale of goods by DESCRIPTION there is an implied condition that the goods shall correspond with the description ; and if the sale be by sample as well as by description, it is not sufficient that the bulk corresponds with the sample, if the goods do not also correspond with the description (§ 13).

This section is strictly construed in favour of the buyer, and "description" covers not only matters which go to the nature of the goods sold, but also such attributes as the date of shipment, or the particular ship, or the mode of packing named in the contract.

Thus, where there was a contract to purchase rice to be shipped at Madras in March and April, it was held that the buyer was not bound to accept a cargo of rice part of which was shipped in February (*Bowes v. Shand* (1877), 2 App. Cas. 455).

Again in *James Finlay & Co., Ltd. v. N.V. Kwik How Tong Handel Maatschappij* ((1928), 166 L.T. 455), the date of shipment of goods was incorrectly stated in the bill of lading. It was held that the buyer could repudiate the contract and sue for damages sustained. In this case, sub-purchasers had refused to take delivery upon the same ground, and a subsequent sale of the goods by the buyer resulted in a loss. He was not bound to sue the sub-purchasers as a condition precedent to bringing his action against the vendor.

A. agreed to buy "Long staple Salem cotton," guaranteed equal to sample, allowance to be made for inferior quality. He was not bound to accept "Western Madras cotton," which was of a different description and inferior, and required different machinery to work it (*Azimar v. Casella* (1867), L.R. 2 C.P. 677 Ex. (h.)). In *Bowes v. Shand* (*supra*), Lord Blackburn said, "if the description of the articles tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it."

A purchaser who had agreed to buy oil called "foreign refined rape oil, warranted only equal to sample," was held entitled to refuse the bulk, although it corresponded with the sample, because it was not "foreign refined rape oil," and therefore did not correspond with the description (*Nichol v. Godts* (1854), 10 Ex. Ch. 191).

A contract was entered into for the sale of timber to be shipped from abroad in specified quantities variable at the seller's option within specified percentage limits, subject to a provision that the buyer "shall not reject the goods herein specified, but shall accept and pay for them in terms of contract against shipping documents." It was held that the buyer was entitled to reject goods which exceed the permissible quantity, for the goods tendered were not the goods "herein specified" within the meaning of the rejection clause (*Green v. Arcos Ltd.* (1931), 47 T.L.R. 336).

In all cases where the buyer has not seen the goods, and buys them relying entirely on the description, there is a contract for the sale of goods by description (*Varley v. Whipp* (1900), 1 Q.B. 513). And even when the buyer had seen the goods before purchase,

there, may, nevertheless, be a sale by description unless the non-compliance with the contractual description was or ought to have been apparent to the buyer (*Josling v. Kingsford*, 32 L.J. C.P. 94, and *c.f. Thornett v. Beers & Sons* (1919), 1 K.B. 486, per Bray, J. at p. 488).

- (4) Subject to the provisions of the Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose except as follows :—

- (1) Where the buyer expressly or by implication makes known to the seller the PARTICULAR PURPOSE for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose ; provided that in the case of a contract for the sale of a specified article under its patent or trade name there is no implied condition as to its fitness for any particular purpose.
- (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of a merchantable quality ; provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed.

- (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- (4) An express warranty or condition does not negative a warranty or condition implied by the Act unless inconsistent therewith (§ 14).

Under this Section the buyer was held to have "examined the goods" where he had inspected and had the opportunity of examining them, being estopped in these circumstances from denying that he had in fact examined them (*Thornett v. Beers & Sons, supra*).

Where goods are sold under a patent or trade name, though there is no implied condition of fitness for a particular purpose, the articles must nevertheless be merchantable under subsection (2) (*Bristol Tramways v. Fiat Motors* (1910), 2 K.B. 831); and a condition of fitness will even attach when it can be shown that the buyer relied upon the seller's skill and judgment.

In *Baldry v. Marshall Ltd.* ((1925), 1 K.B. 260), B. informed the defendants (who were motor-car dealers) that he required a comfortable car suitable for touring purposes. The firm recommended a "Bugatti" which B. bought. B. regarded the car as uncomfortable and unsuitable for the purpose for which he required it. It was held that he was entitled to reject the car and recover the price.

Where goods are ordered for a special purpose, which is disclosed to the seller, such order is sufficient to show that the buyer relies on the seller's skill and judgment (*Manchester Liners v. Rea* (1922), 2 A.C. 74).

Where it is known that goods sold are intended for human consumption, there is an implied warranty that there is nothing in them injurious to health

(*Holt v. Wren* (1903), 19 T.L.R. 292; *Frost v. Aylesbury Dairy Co.* (1905), 21 T.L.R. 300).

Where under a contract of sale, mineral waters are supplied in bottles, not only the contents, but the bottles themselves (although the property in them does not pass) are goods supplied within the meaning of § 14 (1), and there is an implied warranty that they are fit for their purpose. A vendor is liable in damages for personal injuries caused by the bursting of a bottle (*Gedding v. Marsh* (1920), 36 T.L.R. 337, D.).

A similar decision was given in *Morelli v. Fitch & Gibbons* ((1928), 2 K.B. 636), where the subject matter of the contract was a bottle of Stone's Ginger Wine. Upon opening it, the bottle broke with resultant injury to the plaintiff's hand.

The WARRANTIES which, by the Sale of Goods Act, are implied to every contract are less numerous than the conditions. These implied warranties are as under :—

- (1) That the buyer shall have and enjoy QUIET POSSESSION of the goods.
- (2) That the goods shall be FREE FROM ANY CHARGE OR INCUMBRANCE in favour of any third party, not declared or known to the buyer before or at the time when the contract is made (§ 12 (2) and (3)).

Under the Chain Cables and Anchors Act, 1899, § 2, there is an implied warranty on the sale of a cable that it has been duly tested and stamped; while the Merchandise Marks Act, 1887, § 17, implies a warranty of the genuineness of a trade mark.

There are also implied warranties of quality or fitness under the Hops (Prevention of Frauds) Act, 1866; the Sale of Food and Drugs Act, 1875, and the Fertilisers and Feeding Stuffs Acts, 1893 and 1926.

§ 2.—The Transfer of the Property.

(a) The Passing of Ownership.

The ascertainment of the time at which the *property* in goods passes from seller to buyer is of the utmost importance in order to determine at whose risk they are at a given moment.

(i) If goods are UNASCERTAINED, that is to say, not unconditionally appropriated to the contract, no property passes till they are actually ascertained (§ 16); and if sale of a portion of a bulk is made, there is no transfer of the property in that portion till it is actually separated from the bulk and ascertained (*Laurie & Morewood v. Dudin & Sons* (1926), 1 K.B. 223), but unless otherwise agreed, the goods remain at the seller's *risk* until the property therein is transferred to the buyer, whereupon the goods are at the buyer's risk whether delivery has been made or not. Where delivery has been delayed through the fault of either buyer or seller, the goods are then at the risk of the party in fault as regards any loss which might not have occurred but for such fault (§ 20).

Thus in *Sterns Ltd. v. Vickers Ltd.* ((1923), 1 K.B. 78), the plaintiffs purchased 120,000 gallons of oil, part of 200,000 gallons belonging to the defendants, contained in tanks owned by a storage company. The oil sold was not appropriated, but a delivery warrant was given to the buyers, which was not acted upon for some time. It was held that although the *property* in the oil had not passed, the *risk* had, and the buyers could not recover as a result of the deterioration occurring subsequent to their acceptance of the delivery warrant.

(ii) If the contract be for the sale of SPECIFIC OR ASCERTAINED goods, the *intention* of the parties is the test as to the time at which the property will pass; this intention is to be ascertained in each case from the terms of the contract, the conduct of the parties, and the circumstances of the case (§ 17).

Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, even though the time of delivery or time of payment is postponed (§ 18 (1)). When the property does pass, the risk is also transferred, despite the fact that the seller retains his lien for the unpaid purchase-money; and if any accident happens to the goods subsequently, unless it is caused by the fault of the seller, the loss must be borne by the buyer (§ 20).

Thus in *Tarling v. Baxter* ((1827), 6 B. & C. 360) A. purchased a haystack from B., to be paid for on 4th February, the hay to stand on B.'s land till 1st May, and not to be cut till paid for. The hay was burnt, and the loss fell upon A., as the property had passed to him

If the contract is for specific goods, and the seller is bound to do something to the goods to put them into a deliverable state, the property does not pass till this has been done, and the buyer has had notice (§ 18 (2)).

If, though the goods are in a deliverable state, the seller has still something to do, such as weighing, measuring, or testing, in order to ascertain the price, the property does not pass until such act be done, and the buyer has notice thereof (§ 18 (3)).

By § 62 goods are in a "deliverable state" when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

The owners of a horizontal condensing engine agreed to sell it at a price free on rail in London. It weighed 30 tons and was bolted to and embedded in a floor of concrete. Before it could be delivered on rail it had to be detached and dismantled. The sellers detached it, but in loading it on a truck they damaged it by accident, so that the buyers refused to accept it. In an action by the sellers for goods bargained and

sold, it was held that the property in the engine had not passed to the defendants, on the ground that the plaintiffs were bound to do something which they had not done for the purpose of putting the engine into a deliverable state (*Underwood v. Burgh Castle Brick & Cement Syndicate* (1922), 1 K.B. 343).

(iii) The property in unascertained or FUTURE goods sold by DESCRIPTION passes to the buyer when they are unconditionally appropriated to the contract by one party with the assent of the other. Such assent may be express or implied, and may be given either before or after the appropriation is made (§ 18 (5) (1)).

This unconditional appropriation can be made by the seller delivering the goods to the buyer, or a carrier on his behalf, without reserving the right of disposal (§ 18 (5) (2)). If the right of disposal is reserved, the goods will not pass to the buyer until the conditions imposed by the seller are fulfilled (§ 19 (1)).

The seller is *prima facie* deemed to reserve the right of disposal if goods shipped are by the bill of lading, deliverable to the order of the seller or his agent (§ 19 (2)); and if the seller sends a bill of exchange with bill of lading annexed, to the buyer for acceptance, and the buyer does not honour the bill of exchange, he is bound to return the bill of lading, and if he wrongfully retains it the property in the goods does not pass to him (§ 19 (3)). (But see *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, *post* at p. 183.)

(b) Goods on Sale or Return.

Section 18 (4) deals with the question of the time of the passing of the property in goods delivered on *approval*, or on *sale or return*. Unless a different intention appears, the property in such goods passes to the buyer—

- (a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction ; or
- (b) When he retains the goods without giving notice of rejection within a fixed or reasonable time.

In *Kirkham v. Attenborough* ((1897), 1 Q.B. 201, C.A.) jewellery was sent by A. to B. "on sale or return." B. pledged the jewellery with C. Was the pledge an act "adopting the transaction"? If so, then the property passed to B., and A. could not recover it from C., his only remedy being to sue B. for the price. If not, the property still remained in A. and C. could not retain it against him. The Court held that the pledge was an act adopting the transaction. Lord Esher said: "There must be some act which shows that he adopts the transaction; but any act which is consistent only with his being the purchaser is sufficient. . . . He could not get the goods back from the pawnbroker without repaying the sum advanced, and such a situation is inconsistent with his free power to return them."

In a somewhat similar case, goods were forwarded by A. to B. with an appro. note, the terms of which were that the goods were not to pass till invoiced. B. pledged the goods without them having been invoiced to him, with C., who took them in good faith. A. was able to recover the goods from C., since the property had not passed (*Truman v. Attenborough* (1910), 103 L.T. 218).

If the goods are sent with an appro. note showing that they are to remain the property of the sender till paid for in cash or invoiced, then the property does not pass till this condition has been satisfied; and if such goods are improperly dealt with the sender may recover them (*Weiner v. Gill*; *Weiner v. Smith* (1906), 75 L.J. K.B. 916; followed in *Kempster v. Dravingtons* (1925), 41 T.L.R. 519, C.A.)

In the first two cases the goods were not entrusted to a mercantile agent, and therefore it was possible for the original owner to limit the power of the party to whom the goods were entrusted, as regards giving a good title; but if the person to whom the goods are entrusted comes under the head of a mercantile agent, for instance a jeweller's traveller, then even

if such restrictions are placed in the original contract note they are not effective against *bonâ fide* purchasers or pledgees for value who take without notice of the restrictions, since these latter get a good title under the Factors Act, 1889 (*Weiner v. Harris* (1910), 1 K.B. 285).

Another important case on the section is *Ornstein v. Alexandra Furnishing Co.* (12 T.L.R. 128). Here the defendants ordered furniture from the plaintiff, from certain designs, upon the condition that the goods were to be returned if not approved. The furniture was sent to the defendants, who at once wrote saying that they did not approve the goods, and would send them back upon receiving the carriage which they had paid. The goods were eventually sent back twelve days after they had been received by the defendants. It was held that the rule laid down in the section was excluded by the express terms of the contract, and that the defendants' option to return the furniture could only be exercised by actual return, and not by notification; and it was also held that the defendants had kept the goods beyond a reasonable time, and must pay for them.

(c) Title of the Seller.

As a rule only the owner can give a good title to a purchaser. A buyer acquires a good title if the owner authorises or consents to the sale, or is precluded by his conduct from denying the seller's authority to sell (§ 21 (1)). (As to a factor's right to dispose of goods placed with him, see Chapter II, § 13 (a)). But where the seller has a *voidable* title, which has not been avoided at the time of sale, the buyer acquires a good title to the goods if he buys in good faith and without notice of any defect in the seller's title (§ 23).

Where goods have been obtained by fraud, not amounting to larceny, and are sold to an innocent purchaser for value before avoidance of the original sale, in order to determine the right between the original owner and an innocent sub-purchaser, it will be necessary to see what is the nature of the fraud.

If the fraud were of such a nature that the true owner *intended to transfer the property in, and the possession of*, the goods to the fraudulent purchaser, even though he was induced to do so by the fraud, an innocent sub-purchaser always gets a good title as against the true owner; as for instance where the goods were obtained by means of a worthless cheque.

If the fraud were of such a nature that the original owner *never intended* to transfer the property in, or possession of, the goods to the fraudulent party, as for instance where they are obtained by impersonation, the sub-purchaser, however innocent he may be, gets no title against the true owner unless he buys in market overt. (*See Cundy v. Lindsay, ante.*)

(d) Market Overt.

In the City of London *market overt* (open market) is held every week-day between the hours of sunrise and sunset. In the country, market overt is held only on special days provided for particular places, by charter or prescription.

Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller (§ 22 (1)).

In addition to the existence of good faith on the part of the buyer the following conditions must be complied with in order that the buyer may rely upon the protection afforded by market overt :—

- (a) The goods must have been exposed *publicly* for sale.

- (b) In the City of London the sale must have taken place on the ground floor of the shop and the whole transaction completed there.
- (c) The bulk and not merely a sample must have been exposed for sale.
- (d) The goods must have been of the class usually dealt in by the seller.
- (e) The sale must have taken place between sunrise and sunset.

It is a question of fact in each case whether the premises in the City of London in which goods are sold constitute a shop; it has been held that an auction room on the first floor was not such a shop as to constitute market overt (*Clayton v. Le Roy & Fils* 1911), 27 T.L.R. 206).

Sale to the shopkeeper does not obtain the protection of the custom (*Hargrave v. Spink* (1892), 1 Q.B. 25).

Where goods sold in market overt have been originally stolen, and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the original owner, notwithstanding such sale (§ 24 (1)); but where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in the goods does not revert by reason only of the conviction of the offender (§ 24 (2)). When stolen goods are purchased in market overt, but are re-sold by the purchaser before the thief is convicted, the person so disposing of them does not incur any liability.

The protection afforded by market overt does not cover the sale of horses and neither does it apply to Scotland.

(e) Where Seller's Title is Defective.

When a person after selling goods continues, or is, in possession of the goods, or of the documents of title to them, the delivery or transfer by him of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall confer a good title (§ 25 (1)).

In *Nicholson v. Harper* ((1895), 2 Ch. 415) certain wine was sold which, at the time of the sale, was stored in the cellars of a warehouseman, and remained there after the sale. Subsequently the seller gave the warehouseman, as security for an advance, a lien on all wines and spirits lying in his cellars. The warehouseman then advertised the wine for sale, and the original buyer applied for an injunction to restrain the sale. North, J., granted the injunction, holding that the warehouseman acquired no title, for as between the parties the seller was not in possession at the time he purported to effect the pledge.

Section 25 (2) deals with the converse case to that just mentioned, and provides that when a person having bought, or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or documents of title to goods, the delivery or transfer by that person of the goods or documents of title under any sale, pledge, or other disposition to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall confer a good title on such person.

On this subsection the case of *Cahn v. Pockett's Bristol Channel Steam Packet Co., Ltd.* ((1899), 1 Q.B. 643, C.A.), has decided an important point. In sending goods to a foreign buyer, the seller may forward a bill of lading for the goods, indorsed in blank, together with a bill of exchange for the price of the goods for the buyer's acceptance, and if the

bill of exchange is not accepted, the Act provides that the bill of lading must be returned. If the bill of lading is wrongfully kept, the goods do not pass (§ 19 (3)). In this case, however, the buyer kept the bill of lading without accepting the bill of exchange, and transferred it to an innocent third party for value. The seller stopped the goods *in transitu*. It was held that § 25 (2) of the Act prevailed over § 19 (3), and the delivery of the bill of lading therefore conferred a good title on the person taking it.

It must be noted that the following can also, by virtue of a common law or statutory power of sale, give a good title to goods in which they have themselves no actual right of ownership: sheriffs for executions, a landlord for goods distrained upon, a pawnbroker, an innkeeper, or the captain of a ship.

§ 3.—The Rights of the Parties.

(a) Rights of the Buyer.

(i) *Delivery*.

Delivery and payment are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods; but this is subject to agreement between the parties (§ 28).

Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any provision in relation thereto, the place of delivery

is the seller's place of business if he has one, and if not, his residence ; but if the goods are specific, and to the knowledge of the other party are in some other place, that other place is the place of delivery. And if the goods are in the possession of a third person, there is no delivery till such third person acknowledges to the buyer that he holds the goods on his behalf (§ 29 (1, 3)).

Where the seller has to send the goods, and no time for sending them is fixed, he must send them within a reasonable time. Demand or tender of delivery must be made at a reasonable hour to be effectual (§ 29 (2, 4)).

The cost of putting the goods into a deliverable state is, in the absence of agreement, to be borne by the seller (§ 29 (5)).

(ii) *Incorrect Delivery.*

If the seller delivers to the buyer either less or more than the quantity contracted for, the buyer is entitled to reject the whole ; but where he accepts the whole or part, he must pay for them at the contract rate (§ 30 (1, 2)).

In *Cunliffe v. Harrison* ((1851), 6 Exch. 903), Baron Parke said : "The delivery of 15 hogsheads of claret under a contract to deliver 10 is no performance of that contract, for the person to whom they are sent cannot tell which are the 10 that are to be his ; and it is no answer to the objection to say that he may choose which 10 he likes, for that would be to force a new contract upon him."

In view of the difficulty of exact delivery where the quantity of goods ordered is considerable, the expressions "about" or "more or less" are frequently incorporated in the terms of the contract so as to

provide for a certain latitude and to prevent the buyer standing on the strict letter of the section. The difference between the quantity ordered and that delivered must, however, be reasonable, and if any other factor indicative of quantity is introduced, this will also be considered ; e.g., where the contract was to load a full and complete cargo, say 1,100 tons, and the vessel was capable of taking 1,210 tons, a delivery of 1,080 tons would not satisfy the contract, although only 20 tons short of the quantity mentioned, for it was not a full and complete cargo (*Morris v. Levison* (1876), 1 C.P.D. 155).

When the seller delivers to the buyer goods he contracted to sell, mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole (§ 30 (3)).

If, under a contract of sale of 1,000 standards of timber, about 85 per cent. red wood, and about 15 per cent. white wood, a delivery is made and accepted by the buyers in which white wood largely exceeds 15 per cent., the buyers are precluded from suing for damages as they had the option of rejecting the whole consignment (*Gabriel Wade & English v. Arcos Ltd.* (1929), 168 L.T. 31).

(iii) *Delivery by Instalments.*

The buyer of goods is not bound to accept delivery by instalments, but where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective delivery, or the buyer fails to take delivery of one or more instalments, this may amount either to a breach of condition, or to a severable breach giving a claim to compensation (§ 31).

Where goods are to be delivered by instalments and the price is quoted for each article to be delivered, an action will lie for the payment of the goods delivered, even though other instalments have yet to be made (*Howell v. Evans* (1926), 42 T.L.R. 310—D).

(iv) *Delivery to Carrier.*

Where the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer (§ 32 (1)).

Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omits to do this, and the goods are lost or damaged in the course of transit, the buyer may decline to treat delivery to the carrier as a delivery to himself, or may sue the seller in damages (§ 32 (2)).

If the route involves sea transit, the seller must give such notice to the buyer as may enable him to insure the goods during their sea transit, otherwise they are at the seller's risk; that is to say, though property and possession have passed, the risk has not passed with them (32 (3)). Though the seller agrees to deliver the goods at his own risk, at a place other than where they are when sold, the buyer, unless otherwise agreed, takes the risk of any deterioration in the goods necessarily incident to the course of transit (§ 33).

In *Bull v. Robinson* ((1854), 10 Exch. 346), manufactured iron was sent by canal, at the request of the buyer; it arrived

in a rusty condition, the rusting being "necessarily incident to the course of transit." The buyer was bound to accept it.

When the buyer has *accepted* goods, he cannot rescind the contract, but he is not deemed to have accepted them until he has had reasonable opportunity of examining them, to ascertain whether they are in conformity with the contract, and the seller is bound to afford this opportunity upon tendering delivery, if so requested (§ 34). Acceptance for this purpose consists in the buyer either intimating acceptance to the seller, or doing any act in connection with the goods which is inconsistent with the ownership of the seller; *e.g.*, reselling after inspection of a sample (*Perkins v. Bell* (1893), 1 Q.B. 193, C.A.), or retaining or dealing with the documents of title (*Currie v. Anderson* (1860), 2 E. & E. 592), or retaining the goods after the lapse of a reasonable time without intimating to the seller that he has rejected them (§ 35). If the buyer refuses to accept goods delivered when he has a right to do so, he is not, unless it is otherwise agreed, bound to return them to the seller; it is sufficient if he intimates to the seller that he refuses to accept (§ 36). If the buyer refuses to take delivery within a reasonable time when requested to do so, he is liable to the seller for any loss occasioned by his neglect or refusal, and also for a reasonable charge for the care and custody of the goods (§ 37).

(v) *Damages for Breach.*

The buyer has a right of action against the seller for damages for non-delivery; if there is an available market, he is *prima facie* entitled to recover the difference between the market price and the contract price at the time when the goods should have been

delivered (§ 51). Generally, the measure of damages is the loss naturally resulting from the breach (§§ 50, 51), but the injured party must act reasonably, and if it is open to him to take steps to mitigate the loss, he must do so. If he fails to take such steps, the damages will be assessed at the amount of the loss which would have arisen had such steps been taken. The excess will be deemed to have been caused not by the breach of contract but by the buyer's own negligence or default.

Upon a breach of warranty, the remedy of the buyer is to set up against the seller a claim for damages in diminution or extinction of the price, or to maintain an action against him for damages for the breach of warranty. The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

The measure of damages for breach of warranty is the estimated loss directly and naturally arising in the ordinary course of events from the breach of warranty (§ 53), and if the contract is made under special circumstances to the knowledge of both parties, such additional loss as may reasonably be supposed to have been in the contemplation of the parties as the probable result of the breach.

Copra cattle cake warranted "free from castor" was sold by A. to B., by B. to C., and by C. to D. There was such a large quantity of castor bean present as to cause serious illness to cattle, and D. had to pay damages to various farmers in consequence. Claims were then made through the intermediate purchasers from A. It was held that the damages were not too remote, and that D. was entitled to deal with the cake on the assumption that it was the article contracted for (*British Oil & Cake Co. v. Burshall & Co.* (1923), 39 T.L.R. 406).

In the case of a breach as to quality, the loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they answered to the warranty. Where there is a failure in delivery, the measure of damages is as a general rule the difference between the contract price and the market price at the date of delivery; but where there is no market in which the buyers can purchase, and to the knowledge of the seller, the buyer has bought the goods with a view to re-sale, the buyers are entitled to recover their loss of profit on re-sale, the measure of damages being normally the difference between the contract price and the re-sale price (*Patrick v. Russo-British Grain Export Co.* (1927), 2 K.B. 535).

If interest can be claimed at law, *e.g.*, where there is an agreement to pay interest, or where the debt is of a class upon which the Court would allow interest to be charged, it is recoverable in the case of breach of contract for the sale of goods; and if the consideration has failed altogether, any sums paid under the contract may be recovered (§ 54).

Where a breach of condition has sunk to the level of a breach of warranty, the remedy is nevertheless for breach of condition, despite the fact that it is for damages only, and the right of rescission is lost. The seller may therefore be liable in such a case, even though he has expressly repudiated all warranties (*Wallis v. Pratt* (1911), A. C. 394).

(vi) *Specific Performance.*

Where the contract is for the delivery of specific or ascertained goods, the Court may, if it thinks fit, on the application of the buyer, direct that the contract

shall be performed specifically without giving the seller the option of retaining the goods upon payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the Court may seem just (§ 52).

(b) Rights of the Seller.

In considering the rights of an *unpaid seller against the goods*, the term includes any person who is in the position of a seller; as for instance an agent to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for the price, or a surety who has paid the price. The seller is deemed to be unpaid when the whole price has not been paid or tendered, or when a bill of exchange taken *conditionally* has been dishonoured (§ 38). A person who has purchased goods and has rejected them after paying the purchase price is not in the position of an unpaid seller (*Lyons & Co., Ltd. v. May & Baker Ltd.* (1923), 1 K.B. 685).

The unpaid seller has the following rights AGAINST THE GOODS:—

(i) Lien.

A sale on credit, though the credit may be definitely limited, transfers the property in the goods to the buyer, giving the seller a right of action for the price, and a LIEN on the goods (*i.e.*, a right of retention) if the price is unpaid at the due date (§§ 39 (1); 49 (1)). (For a detailed explanation of what constitutes a lien, *see* Chap. X, § 5, *post.*)

The lien exists where :

- (a) the goods have been sold without any stipulation as to credit, or

(b) where, if credit has been given, the term has expired, or

(c) where the buyer becomes insolvent (§ 41).

The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Where part delivery has been made, the lien may still attach to the remainder of the goods, unless the circumstances show an agreement to waive it (§ 42).

The lien may be *lost* if the unpaid seller delivers the goods to a carrier for transmission to the buyer, without reserving the right of disposal, or when the buyer or his agent lawfully obtains possession of them, or if the right is waived; but it is not lost by reason only of the seller having obtained judgment for the price (§ 43).

The mere assent by the seller of unascertained goods to a sale by the buyer does not of itself amount to a waiver of his right of lien; to have this effect the assent must be so given as to show that the unpaid seller assented to the sub-purchaser being entitled to get delivery of the goods free from any lien under the original contract (*Mordaunt v. British Oil & Cake Mills* (1910), 2 K.B. 502). This assent may be inferred by the issue by the seller of the goods to the buyer of a delivery order which is regarded as a document of title transferable to a sub-purchaser.

In *Anton Jurgens Margarine Fabriken v. Louis Dreyfus & Co.* ((1914), 3 K.B. 41), A. sold a quantity of seed to B. who paid by cheque, which was dishonoured upon presentment. A. gave a delivery order to B. for the goods, and B. resold to C., indorsing the delivery order to him. A. has lost his lien and, notwithstanding that payment by B. has not been made, must give delivery of the seed to C. In *Mordaunt's* case, the seller had not given a delivery order to the purchaser.

If a warehouseman, acting under the instructions of the person on whose behalf he has custody of goods, refuses delivery even to a sub-purchaser in possession of a delivery order, on the ground that the original purchaser has not effected payment, an action will not lie against the warehouseman (*Laurie v. Morewood v. John Dudin & Sons* (1926), 1 K.B. 223).

If the property in the goods has not passed to the buyer, there is no lien in favour of the seller, for a man cannot have a lien on his own goods; but in the several circumstances in which a lien is enforceable, a right of withholding delivery is conferred on the seller, who thus secures an equivalent protection (§ 39 (2)).

(ii) *Stoppage in Transitu.*

After the seller has parted with possession of the goods to a carrier for transmission to the buyer, he has still the right of STOPPAGE IN TRANSITU, i.e., a right to stop the goods and retake possession, *on the buyer becoming insolvent* (§§ 39 (1); 44). This right exists, even though the credit given has not expired, until the goods have reached the buyer or his agent. By exercising the right the seller does not rescind the contract, neither does the property in the goods become revested in him.

The right of stoppage *in transitu* may be exercised by taking possession either of the goods or of the documents of title.

A. sold goods to B., and the latter became insolvent while the goods were in course of transit to Shanghai. A. demanded the bills of lading from C., the shipowner in London, and B.'s trustee in bankruptcy also claimed them. It was held that the demand by A. was effectual as a stoppage *in transitu* (*ex parte Watson* (1877), 5 Ch. D. 35).

It may also be exercised by notice to the carrier, or to his principal, who must pass the notice on to his servant, but he must be given a reasonable time to do so (§ 46 (1)). A notice is ineffectual if addressed to the consignee only, and not to the owner or master of the ship which carries the goods (*Phelps v. Comber* (1885), 29 Ch. D. 813, C.A.).

If part delivery has been made, stoppage *in transitu* can still be exercised on the remainder of the goods, unless the circumstances show an agreement to waive the right (§ 45 (7)).

The carrier receiving notice of stoppage must re-deliver the goods according to the directions of the seller (§ 46 (2)). The seller is under obligation to pay the freight and any expenses incidental to the stoppage (*Booth S. S. Co., Ltd. v. Cargo Fleet Iron Co.* (1916), 2 K.B. 570).

The right may be lost by transit coming to an end, *i.e.*, by the goods coming into the actual or constructive possession of the buyer or his agent; or by an assignment of the bill of lading by the buyer.

The point at which transit ceases must be determined by the facts of each case. The transit of goods is determined *inter alia* in the following circumstances:—

- (a) If, when the goods have reached their appointed destination, the carrier acknowledges to the buyer or his agent that he holds the goods as bailee for the buyer or his agent; but it is not at an end if the carrier remains in possession after the buyer has rejected them, even if the seller has refused to receive them back.
- (b) If the goods are delivered to a ship chartered by the buyer, it is a question depending upon

the circumstances whether they are in the possession of the master as a carrier, or as the buyer's agent; but delivery to the buyer's own ship is a delivery to the buyer.

- (c) Where the carrier wrongfully refuses to deliver to the buyer.
- (d) When the buyer or his agent obtains possession of the goods before their arrival at their appointed destination (§ 45 (1-6)).
- (e) When the goods reach the hands of an agent who is to keep them pending further instructions from the buyer (*Kendall v. Marshall Stevens & Co.* (1883), 11 Q.B.D. 356, 364).

"The essence of the right is that the goods should be in the possession of a middleman" (*Schotsman v. L. & Y. Railway* (1867), L.R. 2 Ch. App. 338). The doctrine of stoppage *in transitu* is always construed favourably to the unpaid seller.

The right of lien or stoppage *in transitu* is not affected by any sale, or other disposition of the goods, which the buyer may have made, unless the seller has assented; but where a document of title has been transferred to any person as buyer or owner of the goods, and that person by way of sale transfers the document to a person who takes it in good faith and for valuable consideration, the unpaid seller's right of stoppage *in transitu* is defeated. If the bill of lading has been pledged, the right can be exercised subject to the claim of the pledgee (§ 47).

(iii) *Re-sale.*

The exercise of the right of lien or stoppage *in transitu* does not rescind the contract; but perishable articles may be re-sold, and also where the buyer does not, after notice from the unpaid seller of his

intention to re-sell, tender the price within a reasonable time, the unpaid seller may re-sell the goods, and recover damages for any loss occasioned by the breach of contract. If the unpaid seller re-sells, the new buyer acquires a good title thereto as against the original buyer (§ 48).

(iv) *Right to sue Buyer.*

Apart from the remedies against the goods, the seller can still sue the buyer for the price, if the property has passed to the buyer. If a date has been agreed for the payment of the price, irrespective of delivery, the seller may maintain an action for the price, although the property in the goods has not passed, nor have the goods been appropriated (§ 49).

Where the buyer wrongfully refuses to accept and pay for the goods, the seller may maintain an action for *damages for non-acceptance*; and if there is an available market, the measure of damages is *prima facie* the difference between the contract price and the market price on the day when the goods ought to have been accepted (§ 50). If the buyer wrongfully refuses to take the goods, he cannot afterwards set up a breach of condition by the seller which he has subsequently discovered (*Braithwaite v. Foreign Hardwood Co.* (1905), 74 L.J. K.B. 688).

§ 4.—Sales by Auction.

Sales by auction are subject to the provisions of § 58 of the Act. (For information as to this part of the subject, see Chapter II, § 13 (d).)

§ 5.—Contracts C.I.F. and F.O.B.

(a) C.I.F. Contracts.

A contract of sale c.i.f. (i.e., cost, insurance and freight) is best defined generally as a contract

for the sale of goods to be carried by sea, which is performed by the delivery of certain documents representing the goods, called shipping documents (*see per Bankes, L.J., in Karberg v. Blythe* (1916), 1 K.B., at p. 510). The distinctive feature of a c.i.f. contract is that the seller, in consideration of an increased price, performs certain services for the buyer—*i.e.*, the seller has to see that the goods are despatched to the contractual destination and are insured up to that point.

In *Biddell Brothers v. E. Clemens Horst & Co.* ((1911), 1 K.B. 214) Hamilton, J., defined the obligation of a seller under a c.i.f. contract as follows:—"The seller.has—

- (1) to ship at the port of shipment goods of the description contained in the contract ;
- (2) to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract ;
- (3) to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer ;
- (4) to make out an invoice., and
- (5) to tender these documents to the buyer so that he may know what freight he has to pay, and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage."

As an alternative to shipping the goods himself, the seller can perform his contract by purchasing goods afloat which have been shipped under a bill of lading or charter-party to the contractual destination.

The shipping documents which the seller has to tender ordinarily mean (1) a bill of lading, (2) a policy of insurance, (3) an invoice.

(1) THE BILL OF LADING must conform to any express requirements in the contract, or if the contract does not expressly deal with the form of bill of lading to be tendered, the bill of lading must be in a form usual in the trade. It must cover the whole transit, and must be such as to enable the buyer to obtain delivery of the goods which he has contracted to buy, or alternatively, to give him a right of action against the carrier in respect of any loss or damage which the goods have suffered *en route*.

(2) Ordinarily a POLICY OF INSURANCE must be tendered, and not a cover note or certificate of insurance. If the buyer accepts a certificate of insurance the seller warrants that the statements in the certificate are true, and undertakes to procure a valid policy (*Harper & Co. v. MacKechnie & Co.* (1925), W.N. 200). The policy must be tendered notwithstanding that the goods have arrived safely at their destination (*Orient Co. v. Brekke* (1913), 1 K.B. 531). The purchaser is entitled to demand a policy which covers all, and only, the goods mentioned in the bills of lading and invoice (*Manbre Saccharine Co. v. Corn Products Co.* (1919), 1 K.B. 198). The policy must cover all risks usually insured in the trade.

Where the goods are deliverable by instalments, the acceptance of one instalment without objection by the buyer to the nature of the policy tendered, does not estop him from raising objection on this score in respect of later instalments (*Malmberg v. H. J. Evans & Co.* (1924), 29 Com. Cas. 235).

(3) **THE INVOICE** must be in the form described by J., Blackburn, in *Ireland v. Livingstone* ((1872), 5 H.L., at p. 406) or in a similar form, that is to say, "debiting the buyer with the agreed price (or the actual cost and commission, with the premiums of insurance and the freight, as the case may be) and giving him credit for the amount of freight which he will have to pay to the shipowner on actual delivery."

The documents must be tendered within a reasonable time from the agreed date of shipment (*Groom Ltd. v. Barber* (1915), 1 K.B. 316), and may be tendered by the seller even though he knows that in the meantime the goods have been lost (*Manbre Saccharine Co. v. Corn Products Co.*, *supra*).

The goods are at the buyer's risk after shipment, and he is obliged to pay against a tender of proper documents, whether or not the goods have arrived, and whether or not they have been lost *en route*, and notwithstanding that the buyer has had no opportunity of examining the goods. Since the contract is performed by the tender of proper documents the buyer's obligation to pay is irrespective of the position of the goods (*Biddell Brothers v. E. Clemens Horst & Co.* (1911), 1 K.B. 214 and 934 (per Kennedy, L.J.), and (1912), A.C. 18). The buyer does not, however, by accepting the documents lose his right to reject the goods if they do not conform with the contract.

The question when the property in goods passes under a c.i.f. contract is a vexed one. Ultimately it is a question in each case of the intention of the parties as shown by the terms and circumstances of the contract. But apart from any clear evidence

of intention, the property probably passes when the shipping documents are tendered to and accepted by the buyer (*Wait v. Baker* (1848), 2 Ex. 1; *The Miraenichi* (1915), P. at p. 78; *Groom v. Barber, supra*). In the last case it was decided that, though the seller must be in a position to pass the property in the goods by the bill of lading if they are in existence, he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tendering the bill of lading.

(b) F.O.B. Contracts.

A contract on f.o.b. terms (free on board) is also a contract for the sale of goods to be carried by sea, but is distinguished from a c.i.f. contract by the fact that the buyer must see to the sea carriage and insurance of the goods himself. The seller's obligation under an f.o.b. contract is only to deliver the goods on board a ship at the agreed place of shipment. The buyer has to see that a ship is there ready to receive the goods. The seller has no concern with what happens to the goods after shipment, but by § 32 (3) of the Sale of Goods Act, the seller must give such notice to the buyer as will enable him to insure the goods during their sea transit, and if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit. Section 32 (3) does not apply to c.i.f. contracts.

The expense of putting the goods on board ship falls on the seller, and the goods are at his risk until they are put on board. Thereafter "his contractual liability as seller ceases, and delivery to the buyer is complete so far as he is concerned," and the goods are at the risk of the buyer (per Hamilton, L.J., in *Wimble v. Rosenberg* (1913), 3 K.B. 743, at p. 757).

The buyer cannot claim delivery of the goods unless and until the goods have been put on board ship (*Maine Spinning Co. v. Sutcliffe & Co.* (1917), 34 T.L.R. 154).

The property in goods sold under an f.o.b. contract usually passes with the risk upon shipment (*Brown v. Hare* (1858), 4 H. & N. 822), but the buyer might be able to reject the goods if they are not up to contract quality when he had no reasonable opportunity for examination until arrival at the port of delivery (*Bragg v. Villanova* (1923), 40 T.L.R. 154).

SYNOPSIS OF CHAPTER IV

NEGOTIABLE INSTRUMENTS

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CHAPTER IV

NEGOTIABLE INSTRUMENTS

§ 1.—Negotiability.

It has already been mentioned in Chapter I, § 10 (b), that negotiability enables a contract evidenced by the negotiable instrument to pass from one person to another without notice to the person liable in respect of it. The essential features of negotiability are that the holder of the instrument for the time being—

- (1) possesses a right of action in his own name ;
- (2) is unaffected by equities, and can obtain a good title (with exceptions which are indicated *post*), despite any defect in the title of the person from whom he received the instrument.

It was at one time thought that the list of negotiable instruments was definitely closed, and was confined to documents of the nature of bills of exchange and promissory notes, and that there was no custom by which any other documents could be indorsed over so as to have the character of negotiability ; but in *Goodwin v. Robarts* ((1875), 10 Ex. 346) it was held that foreign scrip might be rendered negotiable by custom so as to pass a good title free from equities to a *bonâ fide* purchaser. And in the case of *Bechuanaland Exploration Co. v. London Trading Bank* ((1898), 12 Q.B. 68) it was decided that the debentures to bearer of a limited company are negotiable by mercantile custom.

The whole question of negotiability is therefore one of the *law merchant*, and any instrument will be recognised by law as negotiable *if it is so treated by the custom of merchants*; and in the case of bills of exchange, promissory notes, and cheques, the law has recognised the custom of merchants by statute, regulations as to these being now contained in the Bills of Exchange Act, 1882.

At the present time, in addition to bills of exchange, cheques, and promissory notes, exchequer bills, circular notes, dividend warrants, and certain debenture bonds and share warrants are negotiable; whilst amongst instruments possessing somewhat analogous features, but which are not recognised by law as negotiable, are bills of lading, dock warrants and wharfingers' certificates.

§ 2.—Definition and Form of a Bill of Exchange.

The Bills of Exchange Act, 1882, defines a bill of exchange as—

An *unconditional* order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to *pay on demand, or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.*

An order which does not comply with these conditions, or which requires an act to be done in addition to the payment of money, is not a bill of exchange (§ 3 (1, 2)). Thus a bill drawn on a banker, with a condition that a receipt form at the foot be signed before payment, is not a bill of exchange (*Bavins v. London & South Western Bank* (1900), 1 Q.B. 270, C.A.). But a cheque on which the drawer has written the words "to be retained" is nevertheless an unconditional order to the bankers to pay it, the

words "to be retained" only imparting a condition between drawer and payee (*Roberts & Co. v. Marsh* (1915), 1 K.B. 42).

A bill is payable "on demand"—

- (a) which is expressed to be payable on demand, or at sight, or on presentation; or
- (b) in which no time for payment is expressed (§ 10 (1)).

A bill is payable at a "determinable future time" when it is expressed to be payable—

- (a) at a fixed period after date or sight;
- (b) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain (§ 11).

Thus, a bill payable "three months after the death of A" would be valid, but one payable "three months after my (the drawer's) marriage" would be irregular, as the marriage is an event which is not "certain to happen."

The sum payable is a sum certain, *although it may be required to be paid with interest*, or by stated instalments, or by instalments with a provision that upon default in payment of any instalment the whole sum shall become due, or according to an indicated rate of exchange (§ 9 (1)). Where a bill is expressed to be payable with interest, then, unless the instrument otherwise provides, the interest runs from the date of the bill, and if the bill is undated from the date of issue thereof (§ 9 (3)). If the rate of interest is not stated, 5 per cent. is taken.

A bill must be drawn "to or to the order of a specified person or to bearer" so that a cheque drawn "Pay

Cash or Order" does not fall within the definition, and is not therefore governed by the provisions of the Act; it is merely an order to pay (*North and South Insurance Corporation, Ltd. v. National Provincial Bank, Ltd.* (1936), 52 T.L.R. 71).

The person who draws the bill is termed the **DRAWER**, the person on whom the bill is drawn is termed the **DRAWEE**, and the person to whom the bill is payable is termed the **PAYEE**. When the drawee has accepted the bill (*see* § 6), he is termed the **ACCEPTOR**. Thus, in the example of an inland bill which follows, J. Black is the drawer, W. Brown & Co. are the drawees, and F. White is the payee. The person who indorses a bill is termed the **INDORSER**, and the person to whom the bill is indorsed the **INDORSEE**. In some instances, the bill may be drawn payable "to my order," in which case the drawer is himself the payee.

The payee or indorsee of a bill who is in possession of it, or the person in possession of a bearer bill, is the **HOLDER**, and he may be a "holder for value" or a "holder in due course." A **HOLDER IN DUE COURSE** is a holder who has taken a bill—

- (1) complete and regular on the face of it,
- (2) before it was overdue,
- (3) without notice that it had been previously dishonoured,
- (4) in good faith and for value, and
- (5) without notice of any defect in the title of the person who negotiated it (§ 29 (1)).

So long therefore as the bill remains a negotiable instrument and there is nothing irregular about it

to the knowledge of the person to whom it is transferred, such person is a holder in due course provided he has given value. The original payee of a bill cannot, as such, be a holder in due course (*Jones v. Waring & Gillow* (1926), A.C. 670). Any holder of a bill who has taken it in circumstances other than those indicated in the definition above can have no better status than that of a holder for value.

As to what amounts to "good faith" is a matter of fact and must be considered in relation to the circumstances of the case. There must, of course, be no knowledge of a defect in the title of the person from whom the bill is taken, nor must the holder close his eyes to facts which, from their nature, call for enquiry. Mere negligence will not disentitle the holder to recover on the bill so long as his suspicions were not aroused. It is not so much a question as to whether he *ought* to have suspected that his transferor's title was defective but as to whether he *did* suspect and did not pursue his enquiries. Such neglect would amount to bad faith but not otherwise.

In *Raphael v. Bank of England* ((1855), 17 C.B. 161), a bank note for £500 had been stolen and a circular containing a list of stolen notes including the one in question, had been sent to bankers and moneychangers. Upon its being subsequently presented for payment by an agent of a foreign principal, the principal was required to inform the bank of the circumstances in which the note had come into his possession. The head of the firm stated that, at the date of the transaction, he did not call to mind the circular which he, together with others, had received and his statement was believed. It was held that the note had been taken *bona fide* and that the principal was entitled to claim the proceeds.

A HOLDER FOR VALUE need not himself have given value for the bill. If value has at any time been given, the holder is deemed to be a holder for value as regards the acceptor, and all parties to the bill who became parties prior to such time (§ 27 (2)).

The purposes for which bills of exchange are used are many and various, but their primary object is to enable a creditor to obtain from his debtor an instrument which is an indefeasible acknowledgment of the latter's liability, and at the same time affords a means of obtaining funds immediately, or of discharging a liability of the creditor himself by negotiating the bill on to a third party. On accepting a bill drawn upon him, the debtor reaps an advantage inasmuch as he is frequently enabled to obtain an extended term of credit, and he can rest assured in the knowledge that he will, in no circumstances, be called upon to meet his obligation prior to the due date of the bill.

The use of bills of exchange also make possible the settlement of debts of a number of persons by the transfer of one piece of paper, thus increasing the credit facilities so necessary to trade and limiting the demand for actual currency. Thus, if A. owes £100 to B., and B. owes £100 to C., B. may draw a bill on A. payable to C. or order, and the bill will be handed to C., the payee. Another common use, especially in the case of foreign bills, is to be found in the case when A. in London, wishes to pay B., a creditor living in some place where A. has agents; in such a case A. will draw a bill on his agents payable to the creditor B.

So far as inland bills are concerned, it is customary for the drawer to forward the bill to the drawee for acceptance in accordance with arrangements previously made. Upon due acceptance and return of the bill, the drawer has then the option either of—

- (1) holding the bill until maturity.
- (2) discounting it, or

- (3) transferring it to some person to whom he is himself indebted.

At first sight, it might be thought that there is no particular advantage in the adoption of the first-named course, for the interests of third parties are in no way introduced, and the matter is still one between the debtor and his creditor; but upon presentment for payment, the acceptor cannot deny liability, nor can he plead any set-off or other defence that would have been available in relation to the debt itself.

The transfer of the bill to third persons (other than for the purpose of discounting) is not so common in the case of inland bills as might appear from a study of the complex provisions of the Act; for it may be that the terms upon which the bills have been drawn and accepted are not convenient to such third party who generally prefers to draw bills to suit his own requirements. When, however, it is intended so to transfer the instrument, the third party's name may be inserted as payee.

So far as the creditor is concerned, to draw bills on his debtor sometimes operates to his financial advantage, for upon discounting them, he is charged with an amount representing discount at a rate per cent. *per annum*, whereas if he had allowed a cash discount for prompt payment of the debt, such would be an absolute percentage. It is true that there is a contingent liability on the drawer, for, as will be explained later, should the bills not be met by the acceptor at maturity, the drawer himself must take them up; but this risk is slight since it must be remembered that arrangements for drawing bills would, as a rule, only be made where the credit of the debtor has been reasonably established.

Forms of Bills.

INLAND BILL.

£100.

Stamp

1s.

London,

1st Feb., 19..

Three months after date pay to F. White or order the sum of One hundred pounds for value received.

J. BLACK.

To W. Brown & Co.,
Liverpool.

FOREIGN BILL

£1,000.

Stamp

10s.

Ceylon,

1st Feb., 19..

Three months after sight pay this First of Exchange (second and third of even tenor and date unpaid) to A. Johnson or order the sum of One thousand pounds for value received.

R. GREEN & CO.

To C. Clark & Co.,
London.

FOREIGN BILL DRAWN AND PAYABLE OUTSIDE THE
UNITED KINGDOM, AND STAMPED WHEN NEGOTIATED
IN THE UNITED KINGDOM.

Capetown,

£500.

Stamp

2s. 6d.

1st Feb., 19...

Three months after sight pay this First of Exchange (second and third of even tenor and date unpaid) to J. Smith or order the sum of Five hundred pounds for value received.

J. RHODES.

To Emile Leblanc,
Paris.

A bill may not order payment out of a particular fund; but it may indicate a particular fund out of

which the drawee is to reimburse himself, or a particular account to be debited with the amount (§ 3 (3)).

IF THE WORDS AND FIGURES DO NOT AGREE, THE SUM DENOTED BY THE WORDS IS THE AMOUNT PAYABLE (§ 9 (2)).

The drawee of the bill must be named or indicated in the bill with reasonable certainty (§ 6 (1)); and the same applies to the payee when the bill is not payable to bearer (§ 7 (1)). The bill may be addressed to two or more drawees, whether partners or otherwise, but not alternatively or successively (§ 6 (2)). There may be two or more joint payees, or an alternative payee, or the holder of an office for the time being may be the payee (§ 7 (2)).

The validity of a bill is not affected by reason that it is not dated, or that the value given for it is not specified, or that it does not state the place where it is drawn, or the place where it is payable (§ 3 (4)).

The date on the bill is deemed to be the true date, unless the contrary is proved; and a bill is not invalid because it is ante-dated, post-dated, or bears date on a Sunday (§ 13).

Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, the holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly although a wrong date is inserted by mistake and in good faith, and in *every case* where a wrong date is inserted, the bill will be valid if it subsequently comes into the hands of a holder in due course (§ 12).

§ 3.—Inland and Foreign Bills.

An INLAND BILL is defined by the Act as one "both drawn and payable within the British Islands, or drawn within the British Islands upon some person resident therein." Any other bill is a FOREIGN BILL. Unless the contrary appears on the face of the bill, the holder is entitled to treat it as an inland bill (§ 4). It should be noticed that the term "British Islands" includes the Isle of Man and the Channel Islands, but that the term "United Kingdom" does not include these; therefore a bill drawn, say, in the Isle of Man, would be an inland bill as regards notice of dishonour, and would not need to be protested, but for stamping purposes it is a foreign bill.

§ 4.—Capacity to contract by Bill.

The capacity to incur liability upon a bill is co-extensive with the capacity to contract (§ 22 (1)). But the incapacity of one party in no way diminishes the liability of other parties.

If a person signs a bill in a trade or assumed name, he is liable as if he had signed in his own name. The signature of the name of a firm is equivalent to the signature by a person so signing of the names of all persons liable as partners in that firm (§ 23).

An infant incurs no liability by drawing, or indorsing a bill, but the holder may enforce it against any other party (§ 22 (2)); nor is he liable if whilst an infant he accepts the bill, even though it be given for necessaries (*In re Soltykoff; ex parte Margrell* (1891), 1 Q.B. 413). Presumably in this case also, the holder could claim against any previous indorsers as they are estopped from denying to a subsequent

indorser the validity of the bill and their own title thereto (§ 55 (2)). In spite of the provisions of the Infants' Relief Act, 1874, an infant, who after attaining his majority accepted a bill for debts contracted while an infant, would be liable on such bill to a *bond fide* holder for value without notice (*Belfast Banking Co. v. Doherty* (1879), 4 Ir. L.R. Q.B.D. 124). But where a bill is accepted after attaining majority for a loan made during infancy, such bill is by the Betting and Loans (Infants) Act, 1892, § 5, void as against all parties whomsoever. Innocent indorsers would, however, be liable to a transferee for value for failure of consideration.

§ 5.—Obligations of the Parties.

The acceptor of a bill is primarily liable on it—the drawer and indorsers are sureties for him. Even though the drawer be fictitious, the acceptor is estopped from denying his existence. The holder of a bill in which the name of a drawer does not appear, is entitled to insert his own name, or that of some other person, as drawer, but is liable to be defeated by the plea that as a matter of fact there had been no delivery of the bill, or that such delivery had been cancelled, and that there was no authority to insert the name of a drawer (*Watkin Bros., Ltd. v. Lamb and Robertson* (1901), 17 T.L.R. 777). If drawer and drawee are the same person, or if the drawee be fictitious, or a person not having capacity to contract, the holder may treat the document either as a bill or as a promissory note, at his option (§ 5 (2)).

(a) The Acceptor.

The *acceptor* of a bill, by accepting it, engages that he will pay it according to the tenor of his acceptance ;

and he is estopped from denying to a holder in due course the existence and capacity of the drawer or payee and the genuineness of the signature of the drawer as such, but is not precluded from denying the genuineness of any indorsement (§ 54).

(b) The Drawer.

The *drawer* of a bill by drawing it engages that it shall, on due presentment, be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, if proper proceedings have been taken ; he is estopped from denying to a holder in due course the existence and capacity of the payee (§ 55 (1)).

(c) The Indorser.

The *indorser* of a bill by indorsing it engages that it shall on due presentment be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided the proper proceedings have been taken ; and he is estopped from denying to a holder in due course the genuineness of the drawer's signature and all previous indorsements, and to a subsequent indorsee, the validity of the bill or his own title thereto at the time of his indorsement (§ 55 (2)).

(d) Indorsement of a Stranger.

A stranger to a bill is anyone who indorses it without actually having had the bill negotiated to him. He thereby lends the strength of his credit to the person at whose request he has become a party and incurs the liabilities of an indorser to a holder in due course (§ 56).

Where the drawer's name was not filled in at the time that the stranger was requested to indorse (e.g., at the instance of the acceptor) and the accepted bill with the indorsement thereon was handed to the party for whose benefit it had been accepted, it was held that the latter had authority under § 20 of the Act to insert his own name as drawer and payee, and, by then indorsing to complete the bill and have recourse against the stranger (*McDonald & Co. v. Nash & Co.* (1924), A.C. 625). This principle was followed in *National Sales Corporation, Ltd. v. Bernardi* ((1931), 2 K.B. 188), where a bill drawn to the order of the drawer was accepted and then backed before indorsement by the payee. Although it is presumed that a bill was indorsed in the order in which the indorsements appear, the presumption is not conclusive and may be rebutted: and if a stranger indorses a bill as a "backer" and delivers it to the drawer so as to give him an implied authority to complete the bill by his indorsement (where he is also the payee) it is immaterial whether the indorsement of the payee appears above or below that of the stranger (*In re Gooch* (1921), 2 K.B. 593).

Although, where a stranger indorses, it is usually at the request of the drawer or payee, it is quite possible for the indorsement to be added at any stage of negotiation at the instance of a party who is asked to take the instrument. The stranger would, in such circumstances, incur the liability of an ordinary indorser as against any subsequent party.

§ 6.—Acceptance.

Since the drawee incurs no liability on the bill until he "accepts" it, it is customary, in the case of inland

bills, for the drawer to forward the bill to the drawee for acceptance, before negotiating it. Should the drawee decline to accept, the matter is then one of arrangement between the two parties alone. This refusal is somewhat rare as bills are usually drawn as a result of previous agreement. The acceptance by the drawee enables the drawer to negotiate the bill with more freedom as there are then two parties, instead of one liable upon it.

Acceptance is the signification by the drawee of his assent to the order of the drawer. It must be written on the bill and signed by the drawee or his agent. The signature alone is sufficient without any other words. It must not stipulate that payment is to be made in any form other than money (§ 17). Delivery is necessary to complete the acceptance.

(a) The Rules governing presentment for Acceptance.

The bill may be accepted while incomplete, or unsigned by the drawer; or even if it has been dishonoured or is overdue (§ 18).

The bill should always be presented for acceptance, since the drawee is under no liability till he does accept (§ 53 (1)); and if the bill is not accepted on presentment, there is an immediate right of recourse against the drawer and prior indorsers, even though the bill has not matured. Presentment for payment would not be necessary (§ 43 (2)).

The person presenting the bill to the drawee for acceptance must deliver it up to him if required to do so. The drawee may retain possession of it for 24 hours, and must then return it accepted or non-accepted. If he does not do so, the holder must treat it as dishonoured by non-acceptance, otherwise he

will lose his rights against the drawer and indorsers (§ 42); and in the case of a foreign bill it must be protested for non-acceptance if the holder is to retain his rights (*Bank of Van Diemen's Land v. Victoria Bank* (1871), L.R. 3 P.C. 526).

The rules governing presentment for acceptance are contained in § 41 (1) of the Act, and § 41 (2, 3) states when presentment is excused.

- (1) A bill is duly presented for acceptance which is presented in accordance with the following rules :—

- (a) The presentment must be made by or on behalf of the holder to the drawee, or to some person authorised to accept or refuse acceptance on his behalf, at a reasonable hour on a business day, and before the bill is overdue.
- (b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only.
- (c) Where the drawee is dead, presentment may be made to his personal representative.
- (d) Where the drawee is bankrupt, presentment may be made to him or to his trustee.
- (e) Where authorised by agreement or usage, a presentment through the post office is sufficient.

- (2) Presentment (for acceptance) is excused, and a bill may be treated as dishonoured by non-acceptance—

- (a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill.
 - (b) Where, after the exercise of reasonable diligence, such presentment cannot be effected.
 - (c) Where, although the presentment has been irregular, acceptance has been refused on some other ground.
- (3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

Presentment for acceptance is generally optional, and is only absolutely necessary in order to render liable any party to the bill in three specified cases—(1) where it is payable after sight; (2) where the bill expressly so stipulates; (3) where it is drawn payable elsewhere than at the residence or place of business of the drawee (§ 39). But the drawee himself incurs no liability on the bill unless and until he accepts (§ 53 (1)).

Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers (§ 39 (4)).

Subject to the provisions of the Act with regard to cases where presentment for acceptance is excused, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it

within a reasonable time ; if he does not do so, the drawer and all prior indorsers are discharged. In determining what is a reasonable time, regard must be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case (§ 40).

(b) Qualified Acceptance.

An acceptance may be qualified under § 19 of the Act, and results in a variation of the bill as drawn, but the acceptor cannot otherwise limit or negative his own liability on the bill.

Such an acceptance only affects the rights of those who have rendered themselves liable on the bill prior thereto. As previously mentioned, most inland bills are forwarded by the drawer for acceptance, so that whatever variation the drawee wishes to make affects the drawer only, who can agree or not at his discretion. But if the bill has been previously negotiated and a holder presents it for acceptance, he is entitled to assume that the acceptance shall be in the exact terms in which the bill has been drawn. He is not bound to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonoured (§ 44 (1)).

If the holder takes a qualified acceptance without the assent of the drawer and previous indorsers, he releases them from their liability (§ 44 (2)). This is in accordance with the ordinary rules of suretyship, the drawer and indorsers being sureties for the acceptor ; a surety is always freed from liability by any change in the terms without his assent. Assent is assumed after the lapse of a reasonable time from notice being given, if the party concerned does not dissent (§ 44 (3)).

A QUALIFIED ACCEPTANCE may be—

- (1) Conditional *e.g.*, Accepted payable on giving up bills of lading.
- (2) Partial *i.e.*, Accepted for part only of the sum specified.
- (3) Local *i.e.*, Payable only at a particular place; but an acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there *only* and not elsewhere.
- (4) Qualified as to time *e.g.*, Accepted payable in six months instead of three months.
- (5) Acceptance by some only of the drawees.

Where the acceptance is for part only of the amount for which the bill is drawn, it is not necessary to obtain the assent of previous parties; it is sufficient if notice of the fact be given to them before the bill matures. But if a foreign bill is accepted in part it must be protested as to the balance (§ 44 (2)).

The bill is normally payable at the address of the drawee appearing thereon, and as in most cases it is inconvenient in practice for presentment to be made thereat, it is customary for the drawee, upon acceptance, to “domicile” the bill at his bank, *i.e.*, he accepts the bill payable at a specified branch of his bank. By doing so, he does not restrict the rights of a holder, for the latter can if he wishes still present the bill at the drawee’s address; in fact, an additional privilege is conferred which is almost without exception taken advantage of, for it is obviously more convenient

for the holder to pay the bill in to his own bank for collection through the ordinary channels. If, however, the acceptor so qualifies his acceptance that the bill is payable *only* at a bank or some place other than at his specified address, the position of the holder might be adversely affected, for the bank might be situated abroad which would convert the bill into a foreign bill with possible prejudicial effect on the position of the holder or of a prior indorser. Such a qualification therefore may be rejected by the holder.

(c) Delivery.

In order to complete an acceptance, delivery of the instrument by the acceptor is necessary (§ 21 (1)), and the acceptance may be cancelled or revoked at any time before delivery.

In Bank of Van Diemen's Land v. Victoria Bank ((1871), 3 P.C. 526) a bill was left with the drawee for acceptance. The drawee having written his acceptance upon it kept it in his possession, and two days after, having in the meantime heard that the drawer had failed, cancelled the acceptance, and returned the bill to the holder. The drawee was entitled to cancel his acceptance, and had incurred no liability upon the instrument.

Delivery is defined by the Act as "transfer of possession, actual or constructive, from one person to another" (§ 2). It need not be evidenced by the physical transfer of the instrument (although this will in most instances be subsequently effected); delivery will be complete if, after acceptance, the acceptor gives notice to or according to the directions of the person entitled to the bill, that he has accepted it (§ 21 (1)). By § 21 (2) in order to be effectual delivery must, as between immediate parties and as regards a remote party other than a holder in due

course, be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be; and it may be shown that the delivery was conditional or for a special purpose only, and not for the purpose of transferring the property in the bill. A valid delivery by all parties, prior to a holder in due course, is always presumed in favour of such holder (§ 21 (2)). Where the party signing has no longer the bill in his possession, a valid delivery is assumed, but the contrary may be proved (§ 21 (3)).

Notice of acceptance to the person entitled to the bill renders it irrevocable (§ 21 (1)).

Where a simple signature on a blank stamped paper is delivered by the signer, in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover (§ 20 (1)). To be enforceable against any person who became a party to the bill prior to its completion, it must be filled up within a reasonable time and strictly in accordance with the authority given (§ 20 (2)). A holder in due course may, however, enforce the bill even if these conditions have not been complied with (§ 20 (2)).

In *Lloyds Bank v. Cooke* ((1907), 1 K.B. 794, C.A.), the defendant signed a blank stamped piece of paper, and authorised another person to fill it up as a joint and several promissory note for £250, in favour of his bank as the payees, so as to enable him to obtain an advance upon it. The other person filled it up as a joint and several promissory note for £1,000 (for which amount the stamp was available) in favour of his bank as payees, signed it and obtained an advance of £1,000 upon it from his bank. It was held that the defendant was precluded from denying that the note was his note for £1,000, and the bank was therefore entitled to recover the amount.

But it is otherwise where the instrument is unstamped, and is only handed over for safe custody, and with no authority to convert it into a bill.

In *Smith v. Prosser* ((1907), 2 K.B. 735, C.A.), the defendant handed to an agent two unstamped blank forms of promissory notes signed by him, with directions to keep them for him, and if he sent instructions to that effect the agent was to fill them up as promissory notes and raise money upon them. The agent, without receiving instructions to that effect from the defendant, filled up the notes and discounted them with the plaintiff, who *bona fide* gave value for them, the agent misappropriating the money. It was held that as the defendant entrusted the blank signed forms to his agent as custodian only, and not with the intention that he should fill them up or raise money upon them without instructions, he was not estopped from denying that he was liable on the notes. The notes in this case were drawn in South Africa, where the law does not require stamping before issue.

Where, however, there has been no delivery and consequently no direction for the completion of the bill, the holder in due course is not entitled to the general protection afforded by §§ 20 (2) and 21 (3).

In *Barendale v. Bennett* ((1878), 3 Q.B.D. 525, C.A.), B. gave to H. a blank acceptance, authorising him to fill it up. H. did not fill it up, and returned it to B., from whom it was stolen, being subsequently filled up and put into circulation. B. was held not liable on the bill, even to a holder in due course.

(d) Acceptance by Agent.

A bill may be accepted either by the person to whom it is addressed, or by an agent duly authorised on his behalf. Anyone accepting as agent should be careful to state that he is an agent, and for whom he is agent, *otherwise he will be personally liable*. Bills form an exception to the rule that when a contract is made by an agent in his own name, evidence is admissible to charge the undisclosed principal. In order that the agent may escape liability the signature must, in fact, be that of the principal, though written by the hand of the agent (§ 91).

A signature by procuration operates as a notice that the agent has only a limited power to sign,

and the principal is only bound if the agent in so signing was acting within the *actual* limits of his authority (§ 25). A person taking such bill ought to exercise due caution, and it would be only reasonable prudence to require the production of the authority. A person who, without authority, signs the name of another person to a bill, either simply or by a procuration signature, is not liable on the instrument, save in the case of a bill accepted on behalf of a company, and not drawn in the name of the company as registered, when the acceptor is personally liable (Companies Act, 1948, § 108). Though the agent accepting without authority is not liable on the instrument, he may be liable to a subsequent holder in an action for false representation. To sign the name of a person to a bill "per pro." without authority and with intent to defraud is made forgery by the Forgery Act, 1913 (§ 1).

A bill signed by directors of a company must show clearly that it is signed for or on behalf of the company, and that the director or other person signing only intends to sign as agent of that company. The mere addition to the signature of such words as "director," "secretary," etc., will not in itself free the person signing from personal liability (§ 26 (1)).

In *Landes v. Marcus & Davids* ((1909), 25 T.L.R. 478), a cheque drawn in favour of the plaintiff was stamped near the top with the words "B. Marcus & Co., Limited," and was signed by the two defendants as follows:—"B. Marcus, Director; S. H. Davids, Director; ——— Secretary," the space for the signature of the Secretary being left blank. The name of the company did not appear anywhere except at the top of the cheque. The defendants were held personally liable on the cheque.

Again, the person making, accepting, or indorsing a bill on behalf of a company must, in order to bind

the company, be acting under the authority of the company (Companies Act, 1929, § 30). But such "authority" must be express, although in some circumstances the holder may be entitled to assume that such authority exists. Thus, where a bill was drawn on behalf of a company by the managing director and one director and the secretary and was accepted by the secretary in his private capacity, such persons having, in fact, no authority to draw or accept bills on behalf of the company, but, under the Articles, the managing director might have had such authority, a holder in due course was entitled to assume that the bill was authorised, and was not bound to enquire into the internal management of the company, or to prove an actual authority (*Dey v. Pullinger Engineering Co., Ltd.* (1920), 37 T.L.R. 10—D).

On the other hand, where a branch manager of a company wrongfully drew and indorsed bills on behalf of the company, having in fact no authority to do so, though, under the company's constitution, a manager might have been authorised to do so, it was held in *Kreditbank Cassell v. Schenkers, Ltd.* ((1927), 1 K.B. 826) that the holders of the bills were not entitled to assume that he had authority, and, as he had none in fact, the company was not bound by his act which was a fraud upon it. The decision in this case appears to be in conflict with that in *Dey v. Pullinger Engineering Co.*, but the differentiation is probably due to the fact that persons are entitled to assume that a wider authority is invested in the directors of a company than in branch managers, since the former are primarily responsible for the control of the company's affairs, whereas the authority of branch managers is, by implication, of a more restricted character.

A person cannot be liable both as acceptor and indorser, and if a bill is accepted by directors for and on behalf of the company, and the drawer, doubting the company's ability to meet its obligation, requests an indorsement by the directors as additional security, the latter must be regarded as having indorsed in their personal capacity and would be so liable (*Elliott v. Bax Ironside and another* (1925), 2 K.B. 301).

§ 7.—Acceptance for Honour.

In order to obviate any damage to his credit by reason of dishonour by the drawee, the drawer may insert the name of some person to whom application may be made in case of need, and the same may be done by any indorser. The person so indicated is known as the REFEREE IN CASE OF NEED (§ 15). The "case of need" can only accept "*supra protest*," i.e., after the bill has been protested for non-acceptance by the drawee (*see post* p. 229). Any stranger to the bill, whether a referee in case of need or otherwise, may accept for honour with the consent of the holder after the bill has been protested for non-acceptance. The acceptor for honour usually states for whose honour he accepts, and if he does not do so, is deemed to accept for the honour of the drawer (§ 65).

This is the only case in which protest is absolutely necessary in the case of an inland bill, and a bill dishonoured both by non-acceptance and by non-payment must, in such cases, be protested twice. The course followed is this:—

On acceptance being refused, the bill is protested and presented to the "case of need" for acceptance. On maturity it must again be presented to the original

drawee to see if he will pay it. If payment is refused, it must a second time be protested and presented to the acceptor for honour for payment (§§ 65, 67), for an acceptor for honour only engages to pay the bill if it is not paid by the drawee (§ 66). In the case of inland bills, it is sufficient if the bill is "noted for protest" prior to presentment to the "referee in case of need," the actual protest being extended at any time thereafter to date as from the date of noting (§ 93).

The above provisions relate to an *acceptance* for honour, but it should be noted that where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honour of any party liable thereon or for the person for whose account the bill is drawn (§ 68). For such intervention to be possible protest is necessary even though in the ordinary course, as in the case of an inland bill, it would not be required.

§ 8.—Protest.

Should a bill be not accepted or paid, as the case may be, upon due presentment, the holder could take action against the drawer or indorsers in the former instance or additionally against the acceptor in the latter case, for enforcement of his rights. In order to provide evidence of compliance with the provisions of the Act as to presentment where proceedings are taken against any person other than the acceptor, the holder, subject to the reservations referred to *infra*, should hand the bill to a notary public* who,

* A notary public is a person, usually a solicitor, specially appointed for dealing with such matters as presenting bills of exchange, and for attesting deeds, etc., so as to make them authentic as evidence in a foreign Court.

either by his clerk or personally, represents it on the day of dishonour or on the next succeeding business day (§ 51 (4) as amended by the Bills of Exchange (Time of Noting) Act, 1917), and makes an entry in his register of all the facts together with the reason for the dishonour. He also "notes" on the bill or on a slip attached thereto, the date, his noting charges, a folio or similar reference to the entry in the register, and appends his initials. He should also indicate the reason given for the dishonour. This process is known as "noting" the bill and is a preliminary to the more formal "protest" which is a document containing—

- (1) an exact copy of the bill;
- (2) a statement of the parties for and against whom the protest is made;
- (3) the date of the protest and the place where it was made;
- (4) a statement that acceptance or payment was demanded and the answer given, if any, or a statement that the drawee or acceptor could not be found (§ 51 (7)).

The signature and seal of the notary will be placed on the document which must be stamped to an amount equivalent to that of the stamp on the bill with a maximum of 1s. (Stamp Act, 1891, Sch. 1). If the services of a notary public cannot be obtained at the place where the bill is dishonoured, protest may be made by any householder or substantial resident in the presence of two witnesses. A certificate signed by these persons attesting the dishonour of the bill will, in the circumstances, be equivalent to a protest (§ 94).

When protest is necessary, it must be made at the place where the bill was dishonoured, provided that—

- (1) where presentment has been made by post and the bill has been returned by post dishonoured, it may be protested at the place to which it has been returned and on the day of its return if received during business hours, or otherwise on the next business day;
- (2) when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary (§ 51 (6)). For example, if a bill is drawn on X. resident in Birmingham but payable in London, and X. dishonours the bill by non-acceptance, the bill must be protested in London for non-payment.

Protest is required in the case of all dishonoured foreign bills (§ 51 (2)); but in the case of an inland bill, such a course is essential only as a preliminary to acceptance or payment for honour, and even so, "noting" alone would be sufficient prior to presentment for such acceptance or payment, the formal protest being subsequently extended (§ 93).

Except in the two cases referred to when the bill must be protested, "noting" is not a condition precedent to the right of enforcement of the bill (§ 51 (1)). Noting may be of advantage, however, in ordinary cases, where legal action on the bill is contemplated, since it affords satisfactory evidence that the statutory provisions with regard to presentment have been complied with.

§ 9.—Foreign Bills.

Foreign bills are generally drawn in triplicate, i.e., in a set of three bills identical in terms, except that each is expressed to be payable only on condition that the other parts or either of them have not been paid. The first two parts being forwarded separately, the inconvenience resulting from the bill being lost is greatly diminished. The utility of the bill as a negotiable instrument is also increased; for, if there is a doubt as to the acceptance of a foreign bill, the first part may be sent unindorsed to a correspondent of the drawer in the place of payment to have it accepted by the drawee, and the second part may then be sold, and put into circulation, bearing the name and address of such correspondent "in case of need." The drawee would doubtless have already accepted the first part of the bill presented to him by the drawer's correspondent and would not then accept the second part, for he would render himself liable as if the two parts were two bills, since they would be in the hands of different holders. Upon refusal of the drawee to accept, the second part would be presented to the referee in case of need who would accept it and, in due course, pay it with the proceeds of the first part of which he is himself the holder. Even though the drawee did not meet the first part, the referee would still be under obligation to pay on the second part. The third part is usually retained by the drawer.

If a bill is drawn in a set, each part thereof being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill; but if the holder indorses two or more parts to different persons he is liable on every such part, and each

subsequent indorser is liable on the part he has indorsed, as if they were separate bills.

Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill.

The acceptance may be written on any part, and must be on one part only; if the drawee accepts more than one part, he is liable to a holder in due course for every such part.

Upon payment he should require the accepted part to be delivered up or he may incur further liability upon it (§ 71).

For a form of foreign bill, *see* § 2.

In some cases, only one copy of a foreign bill may be drawn; this is termed a "Sola of Exchange."

§ 10.—Consideration.

Any consideration sufficient to support a simple contract will be valuable consideration for a bill, *as also will an antecedent debt or liability* (§ 27 (1)).

It is not essential that the nature of the consideration should appear on the face of the bill. As the bill may be negotiated, it may not be desirable to communicate this information to third parties. As an indication that consideration has been given, the words "for value received" are generally included, but the absence thereof has no effect upon the validity of the bill (§ 3 (4) (b)). It is always presumed that a bill has been made for consideration, but this may be rebutted *as between immediate parties*.

Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards

the acceptor, and all parties to the bill who became parties prior to such time (§ 27 (2)).

If the holder has a lien upon the bill, he is a holder for value to the extent of the sum for which he has a lien (§ 27 (3)).

A person signing a bill without consideration, whether as drawer, acceptor, or indorser, is an *accommodation* party. He is liable to a holder for value, and it is immaterial whether the holder, when he took the bill, knew such party to be an accommodation party or not (§ 28).

AN ACCOMMODATION BILL is a bill the acceptor of which is in substance merely a surety for some other person; such acceptor is entitled to be indemnified by the person accommodated.

If a bill is given in payment of a wager upon a game of any kind, it is given for an illegal consideration, and the holder of it cannot recover, unless he can show that he gave value, and did not know the circumstances under which it was given. If, however, the wager is not upon a game, the consideration is not illegal but is deemed to be non-existent; the bill therefore is equivalent to an accommodation bill, and the holder can recover, without being called upon to show that he gave value, while it is immaterial whether he knew of the circumstances under which it was issued (*Fitch v. Jones* (1855), 5 E. & B. 238; *Lilley v. Rankin* (1887), 56 L.J. Q.B. 248).

The legality of the consideration for a cheque drawn on an English bank but given abroad must be determined according to English law, and, therefore, where a cheque was given in payment for money lent for the purpose of gambling at Monte Carlo, where gambling is not illegal, it was held that the payee

could not recover on the instrument (*Moulis v. Owen* (1907), 1 K.B. 746, C.A.). It should be noted, however, that although the creditor cannot sue on the instrument itself, an action will lie for the consideration apart from the instrument when, as in the example given, that consideration is neither void nor illegal (*Saxby v. Fulton* (1909), 2 K.B. 208, C.A.). Also, even though the debt was originally incurred by gaming, yet if a bill or a note for the amount of the debt is subsequently given for a *bonâ fide* consideration (e.g., in consideration of a promise not to post the debtor as a defaulter), then the person to whom the instrument was given can recover upon it (*Hodgkins v. Simpson* (1909), 25 T.L.R. 53).

§ 11.—Negotiation.

A bill is *negotiated* when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. If payable to *bearer* it is negotiated by delivery only; if payable to *order* it is negotiated by indorsement with delivery. In both cases delivery is absolutely necessary to complete the title to the bill (§§ 31, 21 (1)). A bill is payable to bearer when it is expressed to be so payable or when the only or last indorsement is an indorsement in blank (§ 8 (3)). A bill is payable to order, when it is expressed to be so payable, or it is expressed to be payable to a particular person and there are no words prohibiting transfer or indicating an intention that it should not be transferable (§ 8 (4)). If a bill is made payable, either originally or by indorsement, "to the order of A.", A. has the option either of claiming payment himself or of transferring the bill to another person (§ 5 (5)).

(a) Indorsement and Delivery.

An indorsement consists of two distinct contracts ; it transfers the property in the bill, and it involves a contingent assumption of liability on the part of the indorser.

(1) A bill may be indorsed **IN BLANK**, that is, without specifying an indorsee, and the bill then becomes payable to bearer (§ 34 (1)).

(2) A **SPECIAL** indorsement specifies the person to whom, or to whose order, the bill is to be payable (§ 34 (2)). The bill is then payable to the specified indorsee or to his order, and can only be negotiated subject to his indorsement. If a bill has been indorsed in blank, the holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to the order of himself or some other person (§ 34 (4)).

(3) A **RESTRICTIVE** indorsement, as "Pay D. only," puts an end to the negotiability of the instrument ; and anyone taking it from D., takes it subject to equities, that is, to any defences which might have been set up against the transferor (§ 35).

(4) An indorsement **SANS RECOURS** negatives any liabilities on the part of the indorser (§ 16 (1)). Of course a transferee is not bound to take such an indorsement, since he is, if he has given value, entitled to the security of the transferor.

(5) A **FALCULTATIVE** indorsement waives some of the holder's duties towards the indorser (§ 16 (2)). It takes some such form as "Notice of dishonour waived." No subsequent party is obliged to give notice of dishonour to this indorser.

(6) An indorsement *SANS FRAIS* indicates that no expenses are to be incurred on the indorser's account in respect of the bill.

(7) An indorsement *per pro* warns the transferee that the indorser is an agent with limited authority, and he should be careful to ascertain that such agent is acting within the scope of his authority (§ 25).

Thus the manager of a business had authority to indorse cheques *per pro*, for the purpose of paying into the bank, but for no other purpose. He indorsed certain cheques *per pro*, and obtained payment from the bank. It was decided that the banker could not retain the money from the true owners ; the mere fact that the indorsement was *per pro* should have put him upon inquiry, when he would have found that the agent was not acting within the scope of his authority (*Gompertz v. Cook* (1903), 20 T.L.R. 106).

If an indorsement be subject to a condition, as "Pay to the order of A. on his marriage with B.," the condition may be disregarded by the payer, and payment to the indorsee is valid, whether the condition has been fulfilled or not (§ 33). The Act does not compel the payer to ignore the condition and he can therefore insist upon its fulfilment.

The indorsement must be written on the bill itself, signed by the indorser, or on an *allonge*, that is, on a slip of paper attached to the bill (§ 32 (1)). The first indorsement on the *allonge* should begin on the bill and end on the *allonge*, in order to prevent an *allonge* being taken from one bill and attached to another.

By the operation of § 9 of the Finance Act, 1895, every indorsement on a bill of exchange or promissory note, payable to bearer, *intended to operate as a receipt*, requires a stamp if for £2 or over.

If the payee or indorsee of a bill to order is wrongly stated, or his name is wrongly spelt, he may indorse the

bill as therein described, adding, if he thinks fit, his proper signature (§ 32 (4)). A bill cannot be partly indorsed, i.e., for part only of the sum named, or to two or more indorseees acting separately; such an indorsement does not operate as a negotiation of the bill (§ 32 (2)). If there are two or more payees or indorseees who are not partners, all must indorse, unless the party indorsing has authority to do so for the others (§ 32 (3)).

If a bill, payable to order, is transferred for value without indorsement, the transfer only operates as an assignment of a chose in action, and the transferee has no better title than his transferor; but the transferee acquires the right to have the indorsement of the transferor (§ 31 (4)).

(b) Delivery.

A transferor by delivery is one who has taken a bill payable to bearer, and transfers it without indorsement (§ 58 (1)). A transferor by delivery is not liable *on the instrument* (§ 58 (2)), and is also not liable on the consideration for which he transfers if the bill be dishonoured, unless the bill was in respect of an antecedent debt due from him (*Ward v. Evans* (1703), 2 Ld. Raym. 930), or the transfer was not intended to be an absolute discharge of the liability (*Van Wart v. Woolley* (1824), 3 B. & C. 446). For instance, A., the holder of a bill for £100, which has been indorsed in blank, discounts it without himself indorsing it. Upon dishonour of the bill, A. is not liable to refund the sum received from the discounteer (*Bank of England v. Newman* (1700), 1 Ld. Raym. 442).

The transferor by delivery, however, warrants to his immediate transferee, being a holder for value,

that the bill is what it purports to be, that he has a right to transfer it, and that at the time of the transfer he is not aware of any fact which renders it valueless (§ 58 (3)). For a breach of these warranties he would be liable to refund to his transferee whatever his transferee paid to him for the bill.

(c) Overdue Bills.

An overdue bill can only be transferred subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than the person had from whom he took it (§ 36 (2)). In effect it ceases to be a negotiable instrument. If a bill, payable on demand, has been in circulation for an unreasonable time, it is deemed to be overdue for this purpose (§ 36 (3)).

(d) Prohibition of Transfer.

If a bill contains words prohibiting transfer, it is valid as between the parties thereto, but is not negotiable (§ 8 (1)).

§ 12.—Forgeries.

Where a signature on a bill is forged, or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative ; and no right to retain the bill, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature (§ 24). The acceptor, however, is estopped from denying the genuineness of the signature of the drawer (§ 54 (2)) ; and an indorser is precluded from denying the genuineness of the drawer's signature and all previous indorsements (§ 55 (2)).

Moreover, a banker who pays a bill drawn upon himself payable to order on demand is protected by § 60 if he pays it in good faith and in the ordinary course of business, even though an indorsement has been forged or made without authority. **THIS PROTECTION APPLIES TO BANKERS ONLY AND IS ONLY GIVEN IN RESPECT OF BILLS DRAWN UPON THE BANKER AND PAYABLE ON DEMAND, i.e., CHEQUES.**

Where a banker in good faith and without negligence receives payment for a customer of a cheque *crossed generally or specially to himself*, he is protected by § 82, although the customer has no title or a defective title (*see post* p. 275).

The mere negligence of the drawee does not of itself make him liable on a forged bill or cheque even to an innocent holder for value (*Schofield v. Earl of Londesborough* (1896), A.C. 514, H.L. ; *Hall v. Fuller* (1826), 5 B. & C. 750).

§ 13.—Fictitious Payee.

The stringent provisions of § 24 necessitate extreme care on the part of a holder in due course who would, in most circumstances, be unable to determine whether any signature on the bill was unauthorised or had been forged. His title is not, however, affected if in the case of a fictitious or non-existent payee the signature is necessary only to regularise the instrument.

A payee is regarded as fictitious where the name of some person has been inserted but to whom there is no intention on the part of the drawer that payment should be made. Such a course may be resorted to for purposes of fraud or to hide the true identity of the person to whom the bill has been delivered.

Where the payee is a fictitious or non-existent person, the bill may be treated as payable to bearer (§ 7 (3)). Parties to whom the bill is desired subsequently to be negotiated may not be aware of the position, and would naturally require an indorsement to enable them to secure their normal rights. Such indorsement would not be regarded as a forgery in the circumstances, being made without unlawful intention, and the bill would be regarded as payable to bearer.

In a good many instances, the insertion of the name of a fictitious or non-existent payee by the drawer of the bill would be intentional, but in the decided cases referred to *infra*, fraud had been committed by an employee and the question of the validity of the indorsement, having regard to Section 7 (3) was of importance in determining the rights of the persons to whom the bills had been severally negotiated.

The principal cases relevant to the operation of this provision are *Clutton & Co. v. Attenborough* ((1897), A.C. 90), *Bank of England v. Vagliano* ((1891), A.C. 107), and *Vinden & Rogers v. Hughes* ((1905), 1 K.B. 795).

In *Clutton & Co. v. Attenborough*, a clerk of the plaintiffs, fraudulently representing to them that work had been done on their account by B., induced them from time to time to draw cheques payable to the order of B. in payment of the pretended work. There was, in fact, no such person as B., nor had any such work as represented been done on plaintiffs' account. The clerk forged B.'s indorsement to the cheques, and negotiated them with the defendant, who gave value for them in good faith. The cheques were duly honoured by the plaintiffs' bankers, and the plaintiffs, having subsequently discovered the fraud, sought to recover from the defendant the amount of the cheques as money paid under a mistake of fact. It was held that B. was a fictitious or non-existent person within the meaning of § 7 (3) of the Bills of Exchange Act, 1882, though at the time of drawing the cheques the

plaintiffs supposed him to be a real person ; and that consequently the defendant was entitled to treat the cheques as payable to bearer. Inasmuch as the property in a bill payable to bearer passes by delivery only, independent of indorsement, the defendant did not hold the cheques under or through the forged indorsements, no indorsement being necessary to complete his title, and consequently § 24 did not operate to prevent him having the ordinary rights of a holder in due course, and he was not liable to the plaintiffs.

In *Bank of England v. Vagliano Bros.* a bill purporting to be drawn by Vulcina to the order of Petridi & Co., and to be indorsed by them, was accepted by Vagliano Bros., payable at their bankers. The bankers paid it at maturity. Vulcina was the correspondent of the acceptor, who often drew bills in favour of Petridi & Co. The names and signatures of the drawer and payee had, in fact, been forged by a clerk of the acceptor who obtained the money. If the bill had really been drawn in favour of Petridi & Co., and their signature had been forged, the bank would undoubtedly have been liable ; but the House of Lords held that Petridi & Co., though really existent, were fictitious for the purposes of the bill, because their name was inserted without any intention on the part of the persons who actually drew the bill that payment should be made to them, and the bill being therefore payable to bearer, the bank was allowed to debit the acceptor's account with the sum so paid.

It is emphasised that for a payee to be fictitious within the meaning of the Act, he must be non-existent ; or, if he be an existing person, then the drawer must never have intended that payment should be made to him.

This is made clear in the case of *Vinden & Rogers v. Hughes*, where a clerk of the plaintiffs induced his employers to draw cheques in favour of customers to whom in fact nothing was due, and having forged the payees' signatures, cashed the cheques.

It was held that as the drawer did intend that payment should be made to the payees named, and the payees were actually existing persons, then, even though nothing was due to those persons, and the drawer had been fraudulently induced to give the order, the payees were not fictitious within the

decision of *Bank of England v. Vagliano*. This interpretation was approved by the House of Lords in *North and South Wales Bank v. Macbeth* (1908), A.C. 137).

In *Goldman v. Cox* ((1924), 157 L.T. 531), A. had been in the habit of drawing cheques in favour of A.C. A.'s clerk obtaining these cheques after A. had signed them, inserted the letter S before the name A.C., forged an indorsement and obtained cash from X. It was held, following *Vinden & Rogers v. Hughes*, that the payee was not a fictitious person and A. was therefore able to recover the amount from X.

In another case (*Robinson v. Midland Bank, Ltd.* (1924), 41 T.L.R. 170), H. with others, by means of menaces, obtained from A. a cheque for £150,000 payable to R. H. opened an account at the Midland Bank in R.'s name and later drew out £130,000 by means of a cheque signed with R.'s name. As the money had been obtained from A. by means amounting to a theft, the title still remained in A. and R. could uphold no claim to the money. It was also held that as H. was acting under the name of R. without intention that payment should be made to a person of that name, R., as far as the bank was concerned, was fictitious.

§ 14.—The Rights of the Holder.

(a) Generally.

On maturity of the bill, the holder, or some person duly authorised on his behalf, will be entitled to present it for payment; if it be not so presented the drawer and indorser will be discharged (§ 45). The term "holder" means the payee or indorsee of a bill who is in possession of it, or the bearer thereof (§ 2).

A holder may be either a holder for value or a holder in due course, the distinction between them having already been considered (*see p. 219 ante*). A person who is in lawful possession of an order bill, *e.g.*, where it has been lodged with him as security without indorsement over, is not a "holder" within the

meaning of the Act and secures no rights under the instrument, until he secures the indorsement to himself in accordance with the arrangement existing between himself and the transferor. (See the provisions of § 31 (4) on p. 249.)

An accommodation party to a bill—that is, anyone who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor—is liable on the bill to a holder for value (§ 28).

Thus A., the acceptor of an accommodation bill, is sued by B., who received the bill as a present from C., who had himself given value for it. A. has never received any consideration. B. can recover from A. the amount of the bill, for A. is not entitled to raise the question whether or no B. has given value, unless he can show that there has been fraud or illegality at some step of the proceedings (§ 30 (2)). If he can show fraud or illegality, he can call upon B. to show two things—first, that he did not know of the fraud or illegality; and second, that he gave value, that is to say, that he is a “holder in due course” (*Mills v. Barber* (1836), 1 M. & W. 425; *Bailey v. Bidewell* (1844), 13 M. & W. 73).

Absence of consideration is, however, a good defence as between immediate parties, e.g., if A. accepted a bill for the accommodation of B., B. could not recover from A. the amount of the bill if it were dishonoured, as A. could plead that he had received no consideration from B.

A holder, whether for value or not, who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder as regards the

acceptor, and all parties to the bill prior to that holder (§ 29 (3)).

Every holder of a bill is *prima facie* deemed to be a holder in due course ; but if in any action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, force, fear, or illegality, the burden of proof is shifted unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has, in good faith, been given for the bill (§ 30 (2)).

The holder may sue on the bill in his own name, and if he is a holder in due course he holds free from defect of title of prior parties ; the holder may give a good discharge to the person paying the bill in due course, or may confer a good title on a holder in due course, even if his own title is defective (§ 38).

(b) Overdue Bills.

The provision that the bill must have been taken " before it was overdue, and without notice that it had been previously dishonoured," points to two different kinds of bills.

In the case of a bill due after date, anyone taking it can see by inspection whether it is overdue. A person who takes a bill which is on the face of it overdue, takes it subject to any defect of title affecting it at maturity (§ 36 (2)).

In the case of a bill payable at sight or on demand, or a bill which has been dishonoured by non-acceptance, it is impossible to tell by inspection whether it has been presented and dishonoured ; but anyone who takes it before it is overdue, with notice that it has been dishonoured, takes it subject to any defect of title attaching at the time of dishonour

(§ 36 (5)). A bill on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable time (§ 36 (3)). It is a somewhat open question as to what constitutes an unreasonable time. A cheque presented eight days after date has been held not to be "stale" (*London & County Bank v. Groome* (1881), 8 Q.B.D. 288).

(c) Lost Bill.

When the holder of a bill loses it before it is overdue, he may require the drawer to give him another bill of the same tenor; but if required he must give security to indemnify the drawer against all persons whatever, in case the lost instrument should be found again (§ 69). There is no power to obtain a new acceptance or indorsement.

§ 15. - Presentment for Payment.

The holder, or some person authorised to receive payment on his behalf, must present the bill for payment at maturity. It is imperative that the bill be presented for payment, the drawer and indorsers being otherwise freed from liability should the bill not be met.

Presentment for payment must be in conformity with the following rules:—

- (1) Where the bill is not payable on demand, presentment must be made on the day it falls due.
- (2) Where the bill is payable on demand, then presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement in order to render the indorser liable.

- (3) Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found.
- (4) A bill is presented at the proper place—
- (a) Where a place of payment is specified in the bill and the bill is there presented.
 - (b) Where no place of payment is specified, but the address of the drawee or acceptor is given on the bill, and the bill is there presented.
 - (c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.
 - (d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.
- (5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required. (The bill can be treated as dishonoured.)
- (6) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no

place of payment is specified, presentment must be made to them all.

- (7) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.
- (8) Where authorised by agreement or usage a presentment through the post office is sufficient (§ 45).

Section 46 outlines the circumstances in which delay or failure is excused, as follows:—

- (1) *Delay* in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.
- (2) Presentment for payment is *dispensed* with—
 - (a) Where, after the exercise of reasonable diligence, presentment cannot be effected.
The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.
 - (b) Where the drawee is a fictitious person.
 - (c) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(e) By waiver of presentment, express or implied.

If the acceptance of a bill is a general acceptance, presentment for payment is not necessary to render the *acceptor* liable; his liability is not discharged by failure to present for payment nor by failure to give notice of dishonour (§ 52).

Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment, *e.g.*, a bill drawn on the 1st January payable one month after date would fall due (excluding the days of grace) on the 1st February, not on the 31st January. If a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance or for non-delivery (§ 14 (2 and 3)).

§ 16.--Days of Grace.

If the bill is not payable on demand, or at sight, three days of grace are added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace. No days of grace are added when a time fixed or certain is stated in the instrument.

Where the bill is drawn payable abroad, the question as to whether any days of grace are to be added would depend upon the law of the country concerned.

When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal Proclamation as a public feast or thanksgiving day, the bill is due and payable on the preceding business day.

When the last day of grace is a Bank Holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday, and the second day of grace is a Bank Holiday, the bill is due and payable on the succeeding business day (§ 14).

§ 17.-- Dishonour.

A bill may be dishonoured either by (1) non-acceptance where it has been duly presented for acceptance and is not accepted within the customary time (usually 24 hours) (§ 42); or (2) non-payment when it is duly presented for payment and payment is refused or cannot be obtained or where presentment is excused and the bill is overdue and unpaid (§ 47). A bill can also be treated as dishonoured where a Receiving Order in bankruptcy is made against the acceptor prior to the due date of the bill.

(a) Notice.

If a bill is dishonoured, *notice* must be given by or on behalf of the holder to all parties to the bill whom it is intended to charge (§ 48). It is not wise to be content with giving notice to the immediate indorser, since if he in his turn fails to transmit the

notice, the parties entitled to notice will be freed from liability. The notice should be given by the holder of the bill, or an indorser liable on the bill, or the agent of either of them (§ 49 (1, 2)). No particular form of notice is necessary, although it is advisable that it should be in writing as evidence of the fact. Notice must be given within a reasonable time, that is, either on the day after the dishonour, if the person giving and the person to receive notice reside in the same place; or if they live in different places it must be sent off by post either on the day after dishonour, or by the next post thereafter (§ 49 (12)). Even though the drawer or indorser is dead or bankrupt, notice of dishonour must still be given; in the former case to the legal personal representative, and in the latter case to the party himself or his trustee (§ 49 (9, 10)).

If there are two or more drawers or indorsers who are not partners, notice should be given to all, unless one has authority to receive notice for the others (§ 49 (11)).

If notice is sent by post, it is not necessary in order to fix a person with liability that notice should reach him. It is sufficient to prove that it was addressed and posted with reasonable diligence (§ 49 (15)). Delay in giving notice is excused, and notice may be dispensed with, under the following circumstances:—

- (1) Where the *delay* is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct or negligence. When the cause of the delay ceases to operate, the notice must be given with reasonable diligence.

(2) Notice of dishonour is *dispensed* with—

(a) When after the exercise of reasonable diligence, notice cannot be given to or does not reach the drawer or indorser sought to be charged.

(b) By waiver, express or implied. Notice of dishonour may be waived before the time of giving notice has arrived or after the omission to give due notice.

(c) As regards the *drawer*, in the following cases :—

(1) where drawer and drawee are the same person ;

(2) where the drawee is a fictitious person, or a person not having capacity to contract ;

(3) where the drawer is the person to whom the bill is presented for payment ;

(4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill ;

(5) where the drawer has countermanded payment.

(d) As regards the *indorser*, in the following cases :

(1) where the drawee is a fictitious person, or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill ;

(2) where the indorser is the person to whom the bill is presented for payment ;

(3) where the bill was accepted or made for his accommodation (§ 50).

(b) *Circuity of Action.*

It should be noticed that the indorser of a bill may be deprived of his remedies against other

indorsers who would otherwise have been liable to him by the rule against "circuitry of action," or "negotiation back." This will happen when a bill, in the course of circulation, comes twice into the hands of the same person.

Thus, A. indorses a bill to B. It passes on through the hands of H. and others, and again comes into the hands of A., who re-issues it. A. has no remedy against holders between his first and second indorsements; the two sets of rights cancel one another (§ 37). The intermediate indorsers are, however, not released as against a holder taking subsequent to A.'s second indorsement.

(c) Measure of Damages.

The measure of damages recoverable if the bill is dishonoured is (1) the amount of the bill; (2) interest at 5 per cent. (the rate allowed by the Courts), from the date of maturity, or where the bill is payable on demand from the date of presentment; (3) the expenses of noting and of protest, when protest is necessary and has been extended (§ 57 (1)).

In the case of a bill which has been dishonoured abroad, a party entitled may recover from any party liable to him—in lieu of the above damages—the amount of the *re-exchange* with interest till the time of payment (§ 57 (2)). *Re-exchange* represents the sum for which a sight bill could be drawn at the time and place of dishonour at the rate of exchange of the day so as to produce the amount of the dishonoured bill and any expenses incurred upon dishonour.

§ 18.—Discharge of Bill.

(a) Payment.

The bill may be discharged by payment in due course by or on behalf of the drawee or acceptor (§ 59 (1)).

The payment to operate as a discharge must be made at or after the maturity of the instrument, or the acceptor may incur liability to a holder in due course if the bill again gets into circulation (§ 59 (1, 2)). If the drawer or indorser of a bill pays it, he is entitled to the benefit of any securities which may have been deposited by the acceptor with the holder, and retained by the holder at the time of dishonour of the bill (*Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cases 18, H.L.). When a bill is paid, the holder must deliver it to the party paying it (§ 52 (4)).

Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged (§ 59 (3)). Thus, if a bill is accepted for the accommodation of the drawer, and the drawer, after negotiating the bill, takes it up at maturity, the bill is discharged. If the drawer subsequently re-issues it, the holder cannot sue the acceptor (*Cook v. Lister* (1863), 32 L.J. C.P. 127).

(b) Waiver.

A bill may also be discharged by express waiver or renunciation on the part of the holder. The renunciation must be in writing, unless the bill is delivered up to the acceptor. If the holder releases in writing one of the parties to a bill, he also releases all those who would have had recourse to the party released, so far as the person giving the release is concerned; but this does not affect the rights of any subsequent holder in due course, who had no notice of the renunciation (§ 62).

(c) Cancellation and Alteration.

Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent,

the bill is discharged (§ 63 (1)); and if the signature of any party liable is similarly cancelled, such party, and any party having a right of recourse against him is also discharged (§ 63 (2)); but this is not necessarily the case if the cancellation were unintentional, or made without the consent of the holder, or by mistake (§ 63 (3)).

Where a bill is *materially* altered without the assent of all parties liable on the bill, the bill is avoided as against all parties prior to the alteration, unless the alteration is not apparent. If the alteration is not apparent, the holder can sue on the bill as originally issued (§ 64 (1)) (*Scholfield v. Earl of Londesborough* (1896), A.C. 514, H.L.). In particular, the following alterations are material: an alteration of the date, the sum payable, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent (§ 64 (2)).

It is now established that a cheque is on a different footing from other bills in this respect, owing to the relationship existing between banker and customer.

A banker is entitled to rely upon his customer, exercising due care in drawing cheques upon him, and if the customer has been negligent in signing a cheque, so as to enable a dishonest clerk (whom he had no reason to suspect) to alter the amount and obtain a greater sum from the bank, without the alteration being apparent, the banker is able to recover the difference so paid (*Macmillan v. London Joint Stock Bank, Ltd.*, 34 T.L.R., 509 H.L.). This decision would appear to be the only logical one in the circumstances, but the case is of

interest inasmuch as a contrary view was taken in the King's Bench, and Court of Appeal, before being finally settled by the House of Lords. For the banker to be protected the forgery or alteration must be a natural and direct result of the negligence of the customer in drawing the cheque.

But where the alteration of a cheque is effected by an addition to the name of the payee, liability will attach to the banker if he pays it without enquiry.

A. drew a cheque payable to B. or order and handed it to C. at whose request the cheque was drawn. C. inserted after B.'s name "per C." and indorsed the cheque merely as C. paying it into his bank for collection. The cheque was duly paid by A.'s bank. It was held that there was a material alteration which rendered the cheque void under § 84. There was no negligence on the part of A. (as in *Macmillan's case*) in not drawing a line after the name of the payee so as to preclude any subsequent insertion, as a drawer does not contemplate an alteration in this direction in the same way as in the words or figures (*Slingsby v. District Bank, Ltd.* (1931), 172 L.T. 510).

The following are some of the alterations which have been held to be material: the substitution of a particular consideration for the words "value received"; a bill payable three months after date, made payable three months after sight; the alteration of the amount payable; a specified rate of interest altered; or the alteration of the place of drawing having the effect of converting an inland bill into a foreign bill. But where a "bearer" bill is converted to an "order" bill; or an indorsement in blank altered to a special indorsement; or the words "on demand" are added where no time of payment is expressed, the alterations were held to be so immaterial as not to affect the validity of the bill.

(d) Discharge of Surety.

If between the parties to a bill there exists the relationship of principal and surety, and if the holder

of the bill knowing this makes a binding agreement, founded on consideration, to give the principal time, or if he discharges him, the surety is discharged unless the holder expressly reserves his rights against such surety. As renewing a bill or note is the granting of an extended time for payment, the assent of all parties liable on the bill as sureties must be obtained to any renewal, or they will be discharged (*Tindal v. Brown* (1786), 1 T.R. 167).

§ 19.—Promissory Notes.

A promissory note is defined as :

An *unconditional* promise in writing, made by one person to another, *signed by the maker*, engaging to pay, on *demand* or at a *fixed* or *determinable* future time, a *sum certain* in money to or to the order of, a specified person, or to bearer (§ 83 (1)).

PROMISSORY NOTE.

Stamp.

15s.

London,

1st Feb., 19..

Three months after date I promise to pay J. Black or order the sum of One thousand five hundred pounds for value received.

W. JONES.

£1,500 0s. 0d.

The maker of a note engages that he will pay it according to its tenor, and is estopped from denying to a holder in due course the existence of the payee and his then capacity to indorse (§ 88).

A promissory note is inchoate and incomplete until delivery thereof to the payer or bearer (§ 84).

A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor. Where a note runs, "I promise to pay," and is signed by two or more persons, it is deemed to be their joint

and several note (§ 85). The holder of such a note may sue the makers jointly or severally; judgment against one party only does not prevent a subsequent action against the others so long as satisfaction has not been obtained.

But a note which runs, "We promise to pay," and which is signed by two or more persons, is deemed to be a joint note only. The holder of such a note must sue the makers jointly, since judgment against one party, even without satisfaction, bars the remedy against the others.

JOINT AND SEVERAL PROMISSORY NOTE.

Stamp.

London.

10s.

1st Feb., 19..

Three months after date we jointly and severally promise to pay to the order of J Lockhart the sum of One thousand pounds for value received

W. SCOTT.

R. BURNS.

£1,000 0s. 0d.

JOINT PROMISSORY NOTE.

Stamp.

London,

5s.

1st Feb., 19..

On demand we promise to pay J Black or order the sum of Five hundred pounds for value received

H. WHITE.

E JAMES.

£500 0s. 0d.

If a note payable on demand has been indorsed, it must be presented for payment within a reasonable time (§ 86 (1)). Where a promissory note is made payable at a particular place, it must be presented for payment at that place, in order to render the maker liable. In any other case presentment for payment is not necessary in order to render the maker liable, but in order to render an indorser liable it is always necessary to present a note for payment (§ 87 (1, 2)).

The maker of the note is deemed to correspond to the acceptor of a bill, and the first indorser of the note is deemed to correspond with the drawer of an accepted bill, payable to the drawer's order (§ 89 (1)).

The provisions of the Act relating to bills apply *mutatis mutandis* to promissory notes, except as to—

Presentment for acceptance ;

Acceptance ;

Acceptance *supra protest* ;

Bills in a set (§ 89 (1-3)).

Protest of a foreign note is unnecessary (§ 89 (4)).

§ 20.—Cheques.

A *cheque* is :

A bill of exchange drawn on a banker payable on demand (§ 73).

It is consequently subject to the same rules applicable to bills of exchange generally, which are payable on demand. Acceptance is not necessary, and the cheque must be presented within a reasonable time.

Cheques may be presented for payment either at the counter of the branch of the bank on which they are drawn, or, where they have been crossed, by a collecting banker through the medium of the Bankers' Clearing House, or by direct application, according to circumstances.

(a) Crossings.

A cheque may be "crossed," that is to say, two parallel transverse lines may be drawn across the face of it with or without the addition of the words "& Co.," which addition appears to have no legal

significance, and with or without the words "not negotiable." A crossing has the effect of precluding payment over the counter, presentment by a collecting banker being essential. This is a **GENERAL CROSSING**, but if the name of a banker is inserted between the transverse lines or written across the face of the cheque without the lines, it is termed a **SPECIAL CROSSING**, payment being effected only through the medium of the specified bank.

The crossing thus affords considerable protection to the parties legitimately interested in the instrument, as any improper or unauthorised dealing therewith can be traced to the person responsible. Moreover, a paying banker would be regarded as negligent if he paid a crossed cheque over the counter or, in the case of a special crossing, to any other than the banker named.

Further protection is afforded by the addition of the words **NOT NEGOTIABLE**, for where a person takes a cheque so marked, he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had (§ 81). In other words, the negotiable character of the instrument ceases to exist.

Thus, if a cheque so marked is stolen, a person taking it without notice of the defect in title of his transferor is unable to retain it against the true owner; for the cheque being marked "not negotiable," the transferor is unable to give a better title than he himself possessed, i.e., he can give no title at all.

The words "not negotiable" do not restrict the transferability of the instrument, nor do they

prevent the transferor from giving a good title if he has one. There is nothing to prevent the cheque passing from hand to hand, but whoever takes it should satisfy himself as to the title of the transferor, for if this is bad he (the transferee) will have no rights whatever on the instrument.

Wilson & Meeson v. Pickering (1946), K.B. 422).

A partner signed on behalf of the firm a blank crossed cheque form with the words "not negotiable" printed on it, and handed it to his secretary with instructions to fill it up for £2 and to insert the name of the Commissioners of Inland Revenue as payees. The secretary, who was then indebted to Mrs. Pickering in the sum of £54 4s. 0d., fraudulently filled in the cheque for that amount and inserted the name of Mrs. Pickering as payee. Mrs. Pickering took the cheque innocently and obtained payment. When the fraud was discovered, the firm claimed to recover the amount of the cheque from Mrs. Pickering.

Held : The firm were entitled to succeed, as under § 81 of the Bills of Exchange Act, 1882, Mrs. Pickering could not acquire a better title than that of the secretary from whom she took the cheque. The firm were not estopped from denying the secretary's authority, as a cheque marked "not negotiable" is not a negotiable instrument, and the firm owed no duty towards Mrs. Pickering not to be negligent.

It must be noticed that a cheque is the only form of a bill of exchange which can be crossed "not negotiable." In the case of a bill other than a cheque, if it is wished to make it non-negotiable this must appear in the body of the instrument; where a bill is negotiable in its origin, it continues to be negotiable until it has been restrictively indorsed, or discharged by payment or otherwise (§ 36 (1)).

The words "a/c payee only" are sometimes placed in the crossing, and operate as notice to the collecting bank that the account of the payee only is to be credited. This is not a statutory provision, and does not prevent the cheque from being transferable. It

is, however, the custom of bankers to give effect to this crossing, and the collecting banker may be liable for negligence if he fails to do so (*House Property Co. v. London County & Westminster Bank* (1915), 31 T.L.R. 479). The position of the paying banker is, however, not affected, as he would not know to which account the proceeds of the cheque were to be credited, and, moreover, he is only bound to obey the mandate of his customer, the drawer of the cheque, and the words may not have been inserted by the latter.

The crossing is a material part of the cheque, and it is not lawful for any person to obliterate, add to, or alter the crossing, except as provided by the Act, i.e.—

- (1) The holder may cross an uncrossed cheque ;
- (2) He may turn a general crossing into a special crossing ;
- (3) He may add the words “not negotiable” ;
- (4) A banker may cross an uncrossed cheque, or a cheque crossed generally, specially to himself ; or if crossed specially to himself, he may again cross it specially to another banker for collection (§§ 77, 78).

The following is a form of cheque commonly in use :—

No.....

1st Feb., 19..

MIDLAND BANK,

Lower Street, Whitemoor.

Stamp.
2d.

Pay John Jones

or order,

One hundred and five pounds.

W. REDMOND.

£105 Os. 0d.

overdraft has not been reached. As the customer replenishes his account by cheques or other instruments of a similar character, in addition to cash or notes, it follows that the banker occupies the dual position of collecting and paying banker, and his possible liabilities and the protection afforded him will be considered separately.

It is an implied term of the contract between a banker and his customer that the banker will not without consent divulge to third persons information concerning the customer's account, unless he is compelled to do so by order of a Court, or unless a public duty of disclosure arises, or the protection of the banker's own interests requires it (*Tournier v. National Provincial & Union Bank of England* (1924), 1 K.B. 461, C.A.). Nor may a banker close his customer's account which is in credit unless reasonable notice is given (*Prosperity, Ltd. v. Iloyds Bank, Ltd.* (1923), 39 T.L.R. 372).

(c) The Collecting Banker.

By § 82 of the Act, where a banker in good faith and without negligence receives payment on behalf of a customer, of a cheque crossed generally or specially to himself, and the customer has no title, or a defective title thereto, the banker is protected against the claims of the true owner; and, since the Bills of Exchange (Crossed Cheques) Act, 1906, this protection is also afforded if he credits his customer's account with the amount of the cheque before he receives payment thereof. It has been decided that in order to be protected the banker must deal with the cheque for the customer, he must only collect for the customer, and the cheque must be crossed when it comes into the hands of the banker (*Gordon v. Capital & Counties*

Bank (1903), H.L. A.C. 240; and *Gordon v. London & Midland Bank* (1903), H.L. A.C. 240).

The Courts have on numerous occasions been called upon to decide whether, in collecting cheques for a customer, the bank had acted without negligence.

In *Lloyds Bank, Ltd. v. Savory & Co.* ((1933), A.C. 210—H.L.), two clerks of S. & Co. had stolen certain crossed bearer cheques from their employers and paid them into a branch of Lloyds Bank other than that at which their accounts were kept, with instructions that the amounts of the cheques should be credited, in one case to the clerk's own account and in the other, to the account of the clerk's wife. As a result, the receiving branch had no knowledge as to whether the customer was an employee or the wife of an employee, or as to the state and character of the account; whilst the customers' branch would not be aware as to the names of the drawer and payee of the cheques as such cheques would not come into its possession. The House of Lords decided that the bank was liable to the employers as having been negligent in so receiving the cheques and also as to the want of due care in opening the two accounts.

A clerk of the Worshipful Company of Carpenters had, over a long period of years, misappropriated cheques drawn by the company in favour of persons who had supplied or were purported to have supplied goods to the company or done work for it. He forged the indorsements of the cheques and paid them into his account which was kept at the same branch of the bank as was the account of the company. It was held that the bank was liable as the receiving bank, through having acted negligently in crediting the proceeds of the cheques to the account of its customer (the clerk), and that it could not plead immunity by virtue of Section 60 of the Bills of Exchange Act, 1882, in having paid the cheques on behalf of the company, the indorsements having been forged (*Carpenters' Company of the City of London v. British Mutual Banking Co.* (1937), 3 A.E.R. 811, C.A.).

In *Reckitt v. Midland Bank, Ltd.* ((1932), 37 Com. Cas. 202—H.L.), a client had given a solicitor a power-of-attorney entitling him to draw cheques on the former's banking account and apply the moneys for the purposes of the client. The solicitor fraudulently drew 15 cheques signing as attorney of the client and paid them into his own account with the Midland Bank with whom he had an overdraft. It was held that, except in the case of two cheques, the bank was negligent in not making enquiry, having regard to the method of signature and the destination of the proceeds, as to the solicitor's authority to pay these cheques into his own account.

It should be noted that § 82 refers only to cheques, but a banker is frequently called upon to collect in respect of documents of a like character which are not strictly cheques, *e.g.*, orders on a banker to pay the sum mentioned therein conditionally upon an attached receipt being completed; and to cover such cases § 17 of the Revenue Act, 1883, was passed to afford the necessary protection to the *collecting* banker. The Bills of Exchange (Crossed Cheques) Act, 1906, however, did not include such documents in its provisions, and a banker would not be protected if he allowed his customer to draw, before clearance, against any order other than a cheque.

It was considered by the House of Lords in the two cases brought by Gordon, cited *ante*, that bankers' drafts did not come within the definition of a cheque nor were they covered by § 17 of the Revenue Act, 1883 (which specifically referred to orders to pay drawn by a customer on a bank), although the language of § 19 of the Stamp Act, 1853, was sufficiently wide to afford protection to bankers who *bonâ fide* paid such drafts to holders claiming under forged indorsements. The position of the collecting banker, however, remained unsatisfactory. It is now enacted by § 1 of the Bills of Exchange Act (1882) Amendment Act, 1932, that §§ 76-82 of the main Act, as amended by the Bills of Exchange (Crossed Cheques) Act, 1906, shall apply to bankers' drafts as if the same were cheques. They can consequently be crossed and marked "not negotiable" as desired by any party thereto, in the same manner as a cheque, and the collecting banker receives equivalent protection. A banker's draft is defined in the Act as a draft payable on demand drawn by or on behalf of a bank upon

itself, whether payable at the head office or some other office of the bank.

If a cheque is marked "not negotiable," and is payable to some person other than the customer, probably the banker has acted negligently, and will not be protected (*Hannans Lake View Central v. Armstrong & Co.* (1900), 5 Comm. Cas. 188). Even if the cheque is not marked "not negotiable," if it is made payable to a Public Department and indorsed accordingly and then paid into a private account, the banker would be put on enquiry, and would act negligently if he dealt with the cheque without an enquiry (*Ross v. London County & Westminster Bank* (1919), 35 T.L.R. 315).

It must also be remembered that a limited company possesses an entity apart from that of its constituent members, and cheques drawn in favour of the company should not be paid into the private account of a shareholder, even though he is the sole director and holds practically the whole of the shares. In such an event, the banker is put on enquiry and might incur liability (*Underwood, Ltd. v. Bank of Liverpool and Martins* (1924), 1 K.B. 775; *Stewart (Alexander) & Son, of Dundee, Ltd. v. Westminster Bank* (1926), W.N. 271).

(d) The Paying Banker.

The responsibility of the banker in relation to cheques drawn upon him is more onerous than in the case of cheques paid in for collection, for if he improperly pays away money to which the customer is entitled, he is responsible to the latter and must make good the loss; whereas if he incurs liability to a third party in respect of a cheque or similar instrument to which the customer has no title or a defective

title, the banker has a right of indemnity against his customer and could debit the latter's account for the amount involved. The collecting banker's risk is, therefore, generally confined to those instances in which the customer's account is already overdrawn and he proves to be insolvent.

If the banker dishonours a cheque regularly drawn where the funds to the credit of the customer's account are sufficient, the customer can recover damages for injury to his credit. Moreover, the effect of such dishonour is regarded so seriously that it is not necessary for the customer to prove the extent of the damage that he has suffered by the banker's action; and it can be taken as a general rule that the smaller the amount of the cheque, the greater the damage to credit sustained.

Should the holder of a cheque neglect to present it for payment within a reasonable time of its issue, and the drawer's account was sufficiently in credit at the time when presentment should have been made and he suffers actual damage through the delay, he is discharged, as against the holder, to the extent of such damage. In other words, if the debtor (the customer) has available funds at the time when the cheque should have been presented, but the banker has failed before the presentment was actually made, the drawer is discharged from liability. It is further provided that the holder can claim against the bank's estate for the amount of the cheque, the drawer's right of proof for any outstanding balance being correspondingly reduced (§ 74). As to what is a reasonable time for presentment, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case (*ibid.*);

but although some authorities take the view that, in the ordinary course of business, presentment should be made on the day on which the cheque is received, Paget (in *The Law of Banking*) considers that ten days would probably be the limit. If the bank is continuing business (and failures are happily rare), the cheque would be met if the customer's account were sufficiently in credit, but if the cheque had been in circulation for a considerable time, the banker would regard it as "stale" and would generally require confirmation of the order to pay before he honoured it. If, however, he refused to honour the cheque, he should take care so to mark it that the customer's credit is not injured thereby.

A banker's authority to pay a cheque drawn on him is revoked by—

- (i) Countermand of payment by the customer. It is not, however, necessarily revoked by an unauthenticated telegram (*Curtice v. London City and Midland Bank* (1908), 1 K.B. 293).
- (ii) Notice of the customer's death (§ 75).
- (iii) A receiving order in bankruptcy being made against the customer.
- (iv) Knowledge that the customer is drawing cheques for an unlawful purpose.
- (v) Notice of the customer's insanity (*Drew v. Nunn* (1879), 4 Q.B.D. 661).
- (vi) The service of a garnishee order on the banker attaching the customer's balance.
- (vii) Knowledge that the customer is an undischarged bankrupt.

When the customer has countermanded payment, the banker must, however, proceed with caution,

as the circumstances might be such as to render him liable.

In *Hilton v. Westminster Bank* ((1926), 42 T.L.R. 423, C.A.), the customer, by telegram, countermanded payment of a cheque, mentioning the date, the payee, the amount and the number of cheque (117283). The number was quoted incorrectly, but the other particulars correctly related to a cheque numbered 117285. Cheque No. 117285 was presented a few days later and was paid. It was eventually decided by the House of Lords that the banker was not liable, since only one cheque bearing a particular number could be issued, whereas it was possible for two cheques to be drawn for the same amount and in favour of the same person, and the banker had not failed in his duty in relying upon the number quoted in the telegram. It must be noted that the two lower Courts took a contrary view.

The banker should see that the cheque is regularly drawn. If the words and figures disagree, he would mark the cheque accordingly, although, since the words form the essential part of the instrument, the figures being merely supplementary, he would be entitled to honour the cheque on the basis of the words. He does not usually adopt this course, however, although he would not incur risk if the amount expressed to be payable by the words was less than that indicated by the figures.

If there are any alterations on the cheque, they must be authenticated by the initials of the customer. Where a crossed cheque has been "opened," the full signature of the drawer must be appended to the "opening," but even so, bankers will refuse payment over the counter unless the cheque is presented by the drawer or by his known agent. This precaution is the result of a resolution passed by the London Clearing Bankers in 1912, in view of numerous forgeries and as protection to the customer.

The banker should assure himself that the customer's signature as drawer is genuine, for in the event of

forgery, he will be liable to the customer for the amount paid (*Orr v. Union Bank* (1854), 1 Macq. H.L. 513). The customer is, however, under obligation to inform the banker immediately he becomes aware of the irregularity, so as to enable the banker to be in a position to enforce his rights against the delinquent party. Neglect on the part of the customer would relieve the banker of his liability.

In *Greenwood v. Martin's Bank Ltd.* ((1933), A.C. 1—H.L.), G.'s wife forged his signature on about 40 cheques drawn on the defendant bank. Upon his discovery of the forgeries, G. did not at once inform the bank, but some months later when his wife informed him that she wanted more money for the purpose for which the previous cheques had been drawn, he stated his intention of notifying the bank, with the result that the same night the wife committed suicide. Upon the action by G. against the bank claiming to be credited with the amounts of the forged cheques, it was held that the action could not be sustained as his continued silence operated to prevent the bank from taking its remedies against the wife.

The banker does not sustain the same liability where an indorsement has been forged, for if he pays a cheque drawn on himself in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker will be deemed to have paid the cheque in due course, although the indorsement has been forged or made without authority (§ 60). This is an important exception, in favour of the banker, to the rule, that a forged indorsement on a bill is wholly inoperative (§ 24). Whilst a banker is expected to know the signatures of his customers, he cannot ordinarily be acquainted with those of his customers' correspondents; he is under obligation to honour a cheque drawn upon him if there are sufficient funds

to the credit of the customer and the cheque is otherwise in order.

A peculiar position might arise in the not unlikely event of a cheque, the indorsement on which has been forged, being paid for collection into an account at the same branch of the bank on which the cheque has been drawn, so that the banker is, in regard thereto both collecting and paying banker. The facts in *The Carpenters' Company of the City of London v. The British Mutual Banking Co.*, *supra*, should be noted.

There is a growing practice, particularly amongst Local Authorities, to issue "cheques" with a condition that they are to be paid only upon the form of receipt at the foot or on the back thereof being duly completed. Such orders are not cheques, as they do not conform to the statutory definition of being unconditional, and the banker would not be protected if he paid upon a forged indorsement. He should therefore insist upon being indemnified by his customer.

If a cheque is drawn "Pay Cash or Order," it is strictly not a cheque at all, since a bill of exchange must, in accordance with its definition, be expressed to be payable "to, or to the order of, a specified person, or to bearer." It is to be regarded as an order to pay and would not require indorsement. Moreover, the direction "or Order" is of no effect, for "Cash" not being a person, cannot give an order, and in view of the accepted rule with regard to the construction of documents which are partly written and partly printed, where the printed and written words are in conflict, the written words will prevail as indicating the true intention of the party who has executed the instrument (*North and South Insurance Corporation, Ltd. v. National Provincial Bank, Ltd.* (1937), 52 T.L.R. 71).

Apart from the particular protection afforded to bankers under § 60, they are protected generally by virtue of § 80, which provides that where the banker, on whom a crossed cheque is drawn, pays it in good faith and without negligence, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer shall respectively be entitled to the same right and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

This section is wider in its application than is § 60, which confers protection in respect of forged indorsements on cheques only, inasmuch as by Section 17 of the *Revenue Act*, 1883 (*see* p. 277 *ante*) protection is extended to dividend warrants, documentary bills, etc., to the same degree as if such documents were cheques.

§ 21.—Bank Notes.

A bank note is a promissory note issued by a banker, payable to bearer on demand. It may be re-issued after payment, and for that reason the stamp duty is much heavier than in the case of ordinary promissory notes.

Such stamp duties now only apply to notes issued by banks in Scotland or Northern Ireland, for in England the sole note-issuing authority is the Bank of England.

§ 22.—I.O.U.s.

An I.O.U. is merely a memorandum of indebtedness to the holder by the person signing it. It is

evidence of an account stated between the parties, but not of money lent; it is not a negotiable instrument, and does not require to be stamped.

FORM OF I. O. U

No
Stamp.

London,
1st Feb, 19..

I. O. U.

Ten Pounds.

JOHN JONES

§ 23.—Stamps.

A bill or note must be drawn on stamped paper, and the stamp must be an *ad valorem* impressed stamp, save in the case of a bill or cheque payable on demand, or within three days after sight or date, where the duty is two pence, irrespective of amount; in such a case the stamp may be an adhesive stamp, and may be affixed by the party to whom it is presented for payment, and be cancelled by him. The duty on bills drawn or made out of the United Kingdom may be denoted by adhesive stamps, affixed before negotiation in this country (Stamp Act, 1891, §§ 34, 37).

The stamp duties are fixed by the Schedule to the Stamp Act, 1891 (as amended by the Finance Act, 1918, § 36), and are as follows:—

Bill of exchange (payable on demand or at sight, or on presentation, or within three days after date or sight), 2d.

Bill of exchange of any other kind, or promissory note (except a bank note), if drawn, or expressed to be payable, or (subject to the exception stated below), actually paid, or indorsed, or otherwise negotiated in the United Kingdom.

If the value for which the instrument is				s.	d.
drawn does not exceed £10				0	2
Exceeding £10, and not exceeding £25..				0	3
„	25	„	50..	0	6
„	50	„	75..	0	9.
„	75	„	100..	1	0
And for every £100, or fractional part thereof				1	0

Where a bill is drawn in a set, it is only necessary to stamp one part, but if the other parts are negotiated separately from the stamped part, they must be stamped likewise (Stamp Act, 1891, § 39).

A promissory note, even if payable on demand, requires an *ad valorem* stamp.

The duty on foreign bills drawn and payable out of the United Kingdom is determined by the Finance Act, 1899, § 10, and where such bills are actually paid, indorsed or negotiated in the United Kingdom, shall, where the amount for which the bill is drawn exceeds £50, be reduced so as to be—

	s.	d.
Exceeding £50, and not exceeding £100	0	6
„ £100, and for every £100 or fractional part thereof.. .. .	0	6

The duty on bank notes (other than Bank of England notes) is—

	s.	d.
For money not exceeding £1	0	5
Exceeding £1, and not exceeding £2..	0	10
„ 2 „ „ 5..	1	3
„ 5 „ „ 10..	1	9
„ 10 „ „ 20..	2	0
„ 20 „ „ 30..	3	0
„ 30 „ „ 50..	5	0
„ 50 „ „ 100..	8	6

(Stamp Act, 1891, Schedule.)

§ 24.—Payment by Bill or Cheque.

It is the duty of the debtor when his debt is due, in the absence of any different agreement, to seek out his creditor, and tender him the exact amount of his debt, in legal tender. (See Chap. I, § 11 (b) (3).) The debtor is not bound to honour a bill drawn on him by a creditor, unless he has accepted it or contracted to do so ; but on the other hand the creditor is under no obligation to take a negotiable instrument in discharge of the sum due to him.

If a bill or note be taken as payment, such payment may be absolute or conditional, the presumption being that the payment is **CONDITIONAL**. In the latter case, if the instrument is dishonoured, the *original debt revives*, and the holder of the instrument has a right of action both upon the original consideration, and upon the dishonoured bill or note. This applies to a cheque payable on demand as well as to a bill or note maturing at a date subsequent to that upon which it was drawn.

If a bill is taken for the price of goods sold, the lien of the seller is, in general, gone during the currency of the bill, which is equivalent to a term of credit ; but it revives on its actual or practical dishonour, if the goods are still in the seller's possession.

It has been held that the taking of a bill for rent does not suspend the landlord's right of distraint ; though it might be good evidence of an agreement not to distrain during its currency.

§ 25.—Statute of Limitations.

Action on a bill or note is barred, as against any party to the bill, at the expiration of six years from

the time when a right of action first accrued to the then holder against such party.

As against the acceptor, time begins to run from the date of maturity ; for example, in the case of a bill or note payable three months after date or sight, time begins to run from three months and three days after date or sight.

In the case of a bill payable on demand, time begins to run from the date of the bill.

In the case of a promissory note payable on demand, time begins to run, as against the maker, from the date of issue. Thus, as regards a note payable on demand dated January 1, but not issued till July 1, time begins to run from July 1 (*Savage v. Aldren* (1817). 2 Stark. 232).

As regards the drawer or indorser of a bill, time begins to run from the date that notice of dishonour is received.

§ 26.—Bills in Bankruptcy.

In the case of the bankruptcy of any party to a bill or note, the instrument must be produced for proof or dividend, and where the bill is not yet due, the liability of parties antecedent to the bankrupt, against whom a receiving order has not been made, must be treated as security for voting purposes, but not for dividend. The holder must estimate such security, and for voting purposes only prove for the balance (Bankruptcy Act, 1914, Sch. 1 (11)). As in other cases, if the bill has been lost, the holder is still entitled to prove on giving an indemnity.

A distinction, as to the amount which may be proved for, must be drawn between cases where the bill

has been discounted, and where it is held as security. A discounter is a holder for "full value" (*ex parte Twogood* (1812), 19 Ves. 229); but where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien (§ 27 (3)).

Thus A. draws for his own accommodation a bill for £100 on B., and after acceptance by B. indorses it to C. as security for £50. Upon the acceptor becoming bankrupt, C. may prove for £100, but can only receive dividends to the extent of £50 (*ex parte Newton* (1880), 16, Ch. D. 330, C.A.).

If the pledgee of a bill sues a third party, he does so as trustee for the pledgor, so far as the difference between the amount advanced and the nominal amount of the bill is concerned (*Reid v. Furnival* (1833), 1 Cr. & M. 538). If the pledgor could himself have sued upon the bill, the pledgee can recover the whole amount, otherwise he can recover what he has himself advanced if he took without notice of the defective title of the pledgor.

Double Proof.

If two or more parties to a bill of exchange become bankrupt, the holder of the bill can prove against each estate liable on the bill for the full amount of the bill, and can receive dividends in each estate, though he must not receive in all more than the amount of the bill. This right of double proof has given rise to the rule in *ex parte Waring*.

By this rule, where two parties to bills of exchange are both insolvent, and one of the parties holds goods or securities of the other as cover for the bills, the holders of the bills are entitled to have the proceeds of the goods or securities applied in discharge of the

bills, if such goods or securities are unrealised at the time of the failure of the party having them in possession (*ex parte Waring* (1815), 19 Ves. 345; *ex parte Dever, re Suse* (1885), 14 Q.B.D. 611, C.A.).

§ 27.—Conflict of Laws.

The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made.

The duties of the holder with respect to presentment for acceptance or payment, the necessity for or sufficiency of a protest or notice of dishonour or otherwise, are determined by the law of the place where the act is done, or the bill is dishonoured (§ 72).

SYNOPSIS OF CHAPTER V

SURETYSHIP AND GUARANTEES

- § 1.—DEFINITION OF A GUARANTEE.
- 2.—THE WRITTEN MEMORANDUM NECESSARY UNDER THE STATUTE OF FRAUDS.
- 3.—DISTINCTION BETWEEN GUARANTEES AND INDEMNITIES.
- 4.—CONSIDERATION.
- 5.—THE LIABILITY OF THE SURETY.
- 6.—RIGHTS OF THE SURETY.
 - (a) Against the Principal Debtor.
 - (b) Against the Creditor.
 - (c) Against Co-Sureties.
- 7.—DISCHARGE OF THE SURETY.
 - (a) By Fraud.
 - (b) Misrepresentation.
 - (c) Variation of the Agreement.
 - (d) Failure of Consideration.
 - (e) Revocation.
 - (f) Agreement.
 - (g) Death of the Surety.
 - (h) Discharge of Principal.
 - (j) Negligence of Creditor.
 - (k) Lapse of Time.
- 8.—STAMPING.

CHAPTER V

SURETYSHIP AND GUARANTEES

§ 1.—Definition of a Guarantee.

A *guarantee* is a collateral engagement to be answerable for the debt, default, or miscarriage of another. It thus requires three parties : the guarantor or *surety* by whom it is given ; the creditor or guaranteed party to whom it is given ; and the debtor or principal in respect of whom it is given.

It will be seen that this definition covers three different kinds of liability, *i.e.*, that arising from a failure to pay a debt already existing ; that arising from a failure to pay a debt to be afterwards incurred ; and that arising from a failure to perform some obligation other than the payment of money.

§ 2.—The Written Memorandum necessary under the Statute of Frauds.

At common law a contract of guarantee did not require to be evidenced by writing ; but by § 4 of the Statute of Frauds it is enacted that no action shall be brought whereby to charge a person upon any special promise to answer for the debt, default, or miscarriage of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. As already pointed out (Chapter I, § 6 (e)), the contract does not depend upon

this memorandum for its validity; it is good even without writing, but is incapable of being enforced by action, and, further, the consideration for the contract need not be mentioned in the writing. The written evidence may be brought into existence at any time before the action is commenced.

§ 3.—Distinction between Guarantees and Indemnities.

The Statute of Frauds does not apply to every case in which a person is liable to answer for the debt, default, or miscarriage of another; but only to those cases in which there is a special promise to be so answerable.

It is essential to the contract of guarantee that there shall be another contract also in existence relating to the matter, and the principal creditor must be a party to each contract (*Birkmyr v. Darnell* (1705), Sm. L.C. 10th Ed., 287).

If the person making the promise takes the primary liability upon himself, or if the promise is made to the debtor, or some person other than the principal creditor, the promise is one of INDEMNITY only, and WRITTEN EVIDENCE IS NOT NECESSARY to enable the contract to be enforced.

Thus, if a person is induced by another to enter into an engagement by a promise to indemnify him against liability, this is not an agreement which the Statute of Frauds requires to be in writing (*Wildes v. Dudlow* (1874), 18 Eq. 198). In *Guild & Co. v. Conrad* ((1894), 2 Q.B. 885) it was held that a promise by the defendant in consideration of the plaintiff accepting certain bills of exchange, to indemnify him

from liability to make payment in respect of such bills, is a promise of indemnity, and not of guarantee, and therefore is not required to be in writing. The Court considered that this was a promise to keep the plaintiff indemnified against a liability incurred at the request of the defendant, and that it was not a promise to pay in the event of some other person being in default.

Since the existence of a written memorandum is generally the determining factor as to whether a promise of the kind referred to is enforceable or not, it follows that the real intention of the parties, as well as the express terms of the promise must be taken into consideration. If A. gives an unconditional promise to B. to be answerable for C.'s debt, this would be regarded as a guarantee, but if his promise to B. was expressed in some such manner as "I will see you paid," it might be a question as to whether he intended to take the primary or indeed any real liability on himself.

In *Keate v. Temple* ((1797), Bos. & P. 158), a tailor had supplied clothing to various sailors, a lieutenant later stating "I will see you paid at the pay table." The Court held that in view of the large amount involved (£576) and the position of the officer, there was never any intention on the part of the latter to assume primary liability, but that he would merely endeavour to use his good offices to secure payment.

It is therefore necessary to see firstly whether there is a real promise to be responsible, and secondly, whether the promisor assumes primary liability, as in insurance contracts, or whether the promise is given to the creditor and is collateral and dependent upon the default of another.

If the contract, which purports to be a guarantee, is made with a main object other than the payment

of the debt of another person, it is not strictly a guarantee, but a contract of indemnity. The most useful illustration of this is afforded by the case of a *del credere* agent.

In *Sutton v. Grey* ((1894), 1 Q.B. 285), Lopes, L.J., stated that "the true test . . . is whether the person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise."

The contract of a *del credere* agent is therefore a contract of indemnity, and not a guarantee, because the main object of the agreement is not to undertake responsibility for the debt of another person (although this may be the result of the agreement), but to ensure greater care by the agent in selecting the customers with whom he brings his principal into contractual relationship.

So, too, where a purchaser of goods verbally undertakes to discharge a debt due by another in respect of which the creditor is exercising a lien on the goods, the main purpose is to obtain the goods and not to pay the debt. A written memorandum would therefore not be necessary (*Fitzgerald v. Dressler* (1859), 29 L.J., C.P. 113).

Though the promise is on the face of it a guarantee, being made to the principal creditor, and the promisor having only taken a secondary liability, still in the following cases an action will lie, even though there is no written evidence :--

- (1) If the person making the promise has himself any liability or interest in the matter, apart from such as arises from the promise (*Sutton v. Grey*, *supra*).

- (2) If the agreement is in reality a sale by the creditor to the promisor of a security for the debt, or of the debt itself (*Castling v. Aubert* (1802), 2 East 325).

§ 4.—Consideration.

Like every other contract, a guarantee requires consideration to support it, unless it is under seal; and this consideration must be present or future, but must not be past. A promise to pay a debt already incurred by a third person, is not binding unless made on some new consideration; but a promise to forbear to sue for the past debt, or even an actual forbearance on request without a definite promise to do so, is sufficient consideration for a guarantee.

As a general rule the memorandum required by § 4 of the Statute of Frauds must show the names of the parties, the subject-matter of the contract, the consideration, and the promise; but in the case of a guarantee the consideration need not appear in the document.

Section 3 of the Mercantile Law Amendment Act, 1856, provides that the written memorandum which evidences a guarantee need not state the consideration for which the promise was given. Although the consideration need not be specified in writing it must exist, and the person suing upon the guarantee must show that consideration did exist, since there is no presumption of it as in the case of a bill of exchange. The consideration for a guarantee may be proved by parol evidence, but this must not be at variance with any statement made in the memorandum. Parol evidence may be given to identify the terms of the writing; as in *Shortrede v. Cheek* ((1834), 1 A. & E. 57), where the

memorandum stated the consideration was that the plaintiff would withdraw "the promissory note," and parol evidence was allowed in order to show what promissory note was referred to.

§ 5.—The Liability of the Surety.

The extent and nature of the liability of a surety depend primarily upon the instrument creating the liability. The instrument must be construed most strongly against the guarantor, and in favour of the person to whom the promise is given.

But a surety will only incur liability to the extent to which it is to be inferred from the documentary evidence he intended to assume, and therefore if the instrument shows that the surety only intended to assume a joint liability with another, he can only incur liability to that extent (*Other v. Iveson* (1855), 3 Drew 177).

The liability of the surety is only a secondary liability, since he is not answerable till the default of another person. There is no privity of contract between the surety and the principal debtor, for the contract of the surety is made with the creditor, and, therefore, in the absence of agreement to the contrary a judgment obtained against the principal debtor is not binding on the surety, and is no evidence against him if he be sued by the principal creditor. And an admission of liability by the debtor is not conclusive in an action against the surety by the creditor.

Section 28 (4) of the Bankruptcy Act, 1914, provides that an order discharging a bankrupt "shall not release any person who at the date of the receiving order was a partner or a co-trustee with the bankrupt, or was jointly bound, or had made any joint contract

with him, or any person who was surety or in the nature of a surety for him." In *Stacey v. Hill* ((1901), 1 K.B. 660), it was, however, decided that disclaimer by the trustee terminates the lease if the same has not been sublet, mortgaged, or assigned, and a surety for payment of rent is not liable for rent after the date of disclaimer.

The liability of the surety does not arise until the principal debtor has made default. When default is so made, a right of action at once arises against the surety, and in the absence of express agreement to the contrary, the creditor is not bound to sue the principal debtor before taking action against him; nor is the creditor precluded from suing the surety merely because he holds securities from the principal debtor.

If there is no stipulation to the contrary, the creditor can sue the surety without demanding payment from him, or even informing him of the default of the principal debtor. But if the operation of the guarantee be dependent upon the happening of a particular event, the creditor must inform the surety of such event having taken place before he can sue.

Where the guarantee is given in consideration of time being given to the principal debtor, or upon the understanding that others should join as co-sureties, and either of such terms is included in the contract as a condition precedent, the surety will only be liable if such condition is duly performed (*Rolt v. Cozens* (1856), 18 C.B. 673; *Bonser v. Cox* (1831), 4 Beav. 379). But there might be no express indication in the terms of the guarantee that the contract was to be signed by a co-surety, and if in fact a co-surety was intended, the intention may be proved by parol evidence (*Barry v. Moroney* (1873), Ir. R. 7 C.L. 110).

The liability of the surety must be proved against him ; a mere admission of the principal debtor is not evidence to charge him (*Evans v. Beattie* (1797), 5 Esp. 26).

The guarantee only comes into operation from the time that it was intended to do so. Thus, if a person becomes surety for the good behaviour of another while he holds a particular office, he will only be liable for defaults committed after the person has been legally appointed to the office (*Kepp v. Wiggett* (1856), 10 C.B. 35). But a guarantee for money due in respect of goods supplied to a third person would cover goods contracted for at an earlier period but not delivered till after the guarantee was given, if delivery was made on the strength of the guarantee (*Simmons v. Keating* (1815), 2 Stark. 426).

If no limit, or only a pecuniary limit, be placed on the surety's liability, the general rule is that the surety is only liable for losses actually arising from breach of the contract. If a person guarantees the good behaviour of a particular person in some office or appointment, he will only incur liability to the extent to which default is made by that person on matters which are within the scope of the duties attaching to the office or employment (*Leigh v. Taylor* (1827), 7 B. & C. 491). He will be liable, however, for default in respect of transactions delegated to such person in consequence of the guarantee, however unusual such transactions may be (*Melville v. Doidge* (1848), 6 C.B. 450).

Credit must always be given to the surety for sums paid by the principal debtor since he is only liable for the actual loss incurred (*Bardwell v. Lydall* (1831), 7 Bing. 489).

If the debtor were answerable for interest, the surety is also correspondingly liable; so that if the acceptor of a bill of exchange is liable for interest from the due date, the surety will also be liable (*Ackerman & Others v. Ehrenspergen* (1846), 16 M. & W. 99).

If a receiver fails to pay moneys into Court, his surety upon the recognisances is liable for all moneys which the receiver has failed to account for to the extent of the penalty (*Re Graham, Graham v. Noakes* (1895), 1 Ch. 66).

But where a trustee in bankruptcy incurred penalties for retaining moneys in his hands, it was held that his surety was not liable to pay the amount of the penalties; since the failure to pay a penalty was not a failure to perform the duties of a trustee, and by the terms of the instrument of guarantee the liability of the surety was limited to such failure (*Board of Trade v. Employers' Liability Assurance Corporation* (1910), 26 T.L.R. 511, C.A.).

The time over which the liability of a surety extends will depend on whether the guarantee is "continuous" or not. A CONTINUOUS GUARANTEE is one which covers a series of transactions, e.g., a bank overdraft: a non-continuous guarantee is one which is confined to a single transaction.

In the case of a guarantee for goods supplied or for money advanced, the surrounding circumstances as well as the language of the guarantee itself must be looked at, since each case must be governed by its own circumstances. In *Heffield v. Meadows* ((1869), L.R. 4 C.P. 595), Willes J., in his judgment said :

"It is obvious that we cannot decide that question (i.e., whether a particular guarantee was or was not continuous)

upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by word of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee."

In certain circumstances the liability of a surety may be seriously affected after the execution of a guarantee by changes occurring which were not, at the time of execution, in any way contemplated by the parties, as in cases where guarantees have been given to a firm, or in respect of the dealings of a firm, and a change takes place in the constitution either of the firm to which, or of the firm in respect of which, the guarantee is given. Section 18 of the Partnership Act, 1890, provides that any such change has the effect of revoking a continuous guarantee as regards future transactions. Apparently if the change is an increase in the number of persons constituting the partnership, the question of liability will depend to some extent on whether, according to the terms of the instrument, the guarantee was only intended to apply to certain individuals or to the business. A fidelity guarantee may hold good, even after an increase in the number of partners, because the consideration is given once for all (*Barclay v. Lucas* (1786), 1 T.R. 271); but a guarantee as to advances of money is revoked by an increase in the number of partners (*Spiers v. Houston* (1829), 4 Bligh, N.S. 515). The effect is the same where the number of partners is decreased, either by death or retirement. There is no difference in any of these respects where the change is in the constitution of the firm by whom the guarantee is given.

The guarantors of an infant's overdraft at a bank, where all the parties know the facts, cannot be made liable to the bank (*Coutts & Co. v. Browne-Lecky and Others* (1947), K.B. 104).

In case of the bankruptcy of a surety, proof may be made against his estate on the contingent liability. If at the time of lodging his proof the creditor has received payment on account, he can only prove for the net balance. But the proof is not reducible by a dividend received from the estate of the principal debtor after proving against the surety (*In re Blakeley, ex parte Aachener Disconto Gesellschaft* (1892), 9 Morrel, 173). Nor is any reduction in the proof effected by reason of the receipt by the creditor of sums from co-sureties, but the creditor cannot recover in all more than twenty shillings in the £ (*In re Houlder, H. C. Barbridge (Trustee) v. Eagle, Star, etc., Insurance Co.*, 66 L.J. 445).

If the surety receives security from the principal debtor, and afterwards both these parties become insolvent, the creditors of the surety are entitled to regard such security as part of the property of the surety, and are entitled to the benefit of it in discharge of their debts (*Loder's case* (1868), 6 Eq. 491).

§ 6.—Rights of the Surety.

(a) Against the Principal Debtor.

As against the principal debtor the surety has all rights necessary either to free him from liability entirely, or to minimise his loss as much as possible. His most important right is that of compelling the person for whom he is surety to pay the debt, and so to free himself. It is possible for the surety to take proceedings in the Chancery Division for this purpose

the moment that his liability has arisen, and even before he has himself been called upon to pay; and in *Wolmershausen v. Gullick* ((1893), 2 Ch. 514) it was established that one co-surety may claim to be indemnified by another before he has himself made any payment under the common liability. After any payment under the guarantee, the surety is entitled to rank as a creditor against the estate of the principal debtor, and can compel the repayment by the principal debtor of any amounts paid upon his behalf, since if he has become surety with the knowledge and consent of the principal debtor any such payment is treated as being to the use of the principal debtor, and can, therefore, be recovered from him by an action, or may be proved for in his bankruptcy.

The surety can always recover the principal sum which he has paid, and he can also recover interest at 4 per cent. on this principal, for he is entitled to indemnity against loss sustained through the principal's default; and if he can prove that he has suffered further damage by the non-payment of the debt, the surety will be entitled to recover damages also.

(b) Against the Creditor.

As regards the rights of the surety against the principal creditor, the surety cannot, unless he has so stipulated, demand that the creditor should sue the debtor before taking action against the surety (*Wright v. Simpson* (1802), 6 Ves. Jnr. 714). If the surety has guaranteed the good behaviour of another in an employment, and the employed is guilty of such default as would entitle the employer to dismiss him, the surety may call upon the employer to do so (*Sanderson v. Aston* (1879), 8 Exch. 73). When

called upon to pay, the surety is entitled to plead any set-off which the principal debtor may have against the creditor; or may compel the creditor who has a claim on two funds, one of which is not available to the surety, to resort first to that fund which is not available to him.

After payment by the surety he becomes entitled to the right of subrogation; that is to say, he becomes entitled to the benefit of all rights and remedies residing in the principal creditor, by which his liability may be diminished. He is entitled to all securities, whether known to him or not, which the creditor holds against the principal; and if any portion of such security is lost by the act of the creditor, the surety is to that extent discharged (*Taylor v. Bank of New South Wales* (1886), 11 App. Cas. 596). The principal creditor, however, is not bound to preserve securities for the benefit of the surety if the principal debtor is bankrupt; since he may elect to surrender the security and prove for the full amount of the debt (*Rainbow v. Juggins* (1880), 5 Q.B.D. 138, 422).

By the Mercantile Law Amendment Act, 1856, § 5, it is provided that—

5. Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case

may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty ; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him : Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.

(c) Against Co-Sureties.

A surety who has been compelled to pay under the guarantee has, as against his co-sureties, a right of contribution. If one surety be called upon to pay the whole debt, or more than his true proportion, he is entitled to call upon his co-sureties for their due proportion of the common debt.

There is no doubt that the right to demand contribution before payment exists, and that if the surety is called upon to pay part of the whole debt for which he is liable, he may force his co-sureties, by action, to contribute their proportion, even before he has himself paid ; and this even if judgment has been obtained against him personally (*Wolmershausen v. Gullick* (1893), 2 Ch. 514).

After payment, the right does not arise till one surety has paid MORE THAN HIS PROPORTION of the WHOLE of the common debt (*In re Snowden, ex parte Snowden* (1881), 17 Ch. 44).

It does not make any difference in the right to enforce contribution whether the surety did or did not know at the time of incurring the liability that he was to be co-surety with others ; even if he were unaware, the right to enforce contribution exists where the amount paid represents the entire loss for

which the co-sureties are responsible (*Whiting v. Burke* (1871), 6 Ch. App. 342). There is a right of contribution whether the sureties are bound jointly or jointly and severally; and whether they are bound by the same or by different instruments, provided it is the same principal and the same engagement; but if there is a contract that each surety shall be answerable only for a given portion of one sum of money, there is no right of contribution among the sureties. If one surety has become surety jointly with another, at the request of that other, the surety at whose request the liability was undertaken cannot enforce a right of contribution (*Turner v. Davies* (1796), 2 Esp. 479).

As regards the amount which may be recovered by way of contribution, the general rule is that sureties contribute equally.

In *Pendlebury v. Walker* ((1841), 4 Y. & C. 424) Alderson, B., said: "Where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law supersedes that which is not only the principle, but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount, and, if not equally, then proportionately to the amount for which each is a surety."

So if two or more persons join as sureties for a common principal, but in different amounts, they are only liable upon default of the principal, to contribute proportionately to their respective liabilities, and not equally (*Ellesmere Brewery Co. v. Cooper* (1896), 2 Q.B. 75).

If two or more persons indorse a bill for the accommodation of the acceptor or drawer, as between themselves they are co-sureties, not sureties in succession in the order of their names on the bill (*Macdonald v. Whitfield* (1883), 8 App. Cas. 733, P.C.).

If one of the co-sureties is unable to pay, the surety claiming contribution after payment of the principal debt can claim from the sureties who are solvent their respective shares of the whole amount paid, together with interest from the date of payment, *i.e.*, each solvent surety must contribute his respective share of the proportion due by the insolvent surety (*Hitchman v. Stewart* (1855), 3 Drew 271).

If a co-surety has become bankrupt, proof can be made against his estate for the necessary contribution, and even if the actual amount due is not yet ascertained, proof can be made on the contingent liability. If a surety, having paid the whole debt, takes over securities lodged with the principal creditor, he can prove in the bankruptcy of a co-surety for the full amount of the debt, though he can actually only receive dividends to the amount of the proportion due from the co-surety (*In re Parker, Morgan v. Hill* (1894), 3 Ch. 400, C.A.).

The right of the surety to contribution will be barred after six years by the Statute of Limitations ; but since the right to contribution does not arise till the surety has paid more than his share, the time does not begin to run till this has been done, or till the claim against him by the creditor has been established. If a surety has paid part of a debt more than six years before the bringing of an action, and the debtor has paid the remainder of the debt within six years, time only runs from the last-mentioned payment, because until it was made the liability of the co-surety was not determined (*Davies v. Humphries* (1840), 6 M. & W. 153 ; *In re Snowden, ex parte Snowden* (1881), 17 Ch. D. 44, 47).

Sureties are entitled, in addition to the right of contribution, to the benefit of all securities taken by any co-surety to indemnify himself against liabilities under the guarantee.

If a surety has obtained a counter-security from the principal debtor, he is bound to bring it into hotchpot for the benefit of his co-sureties, and this even though he only agreed to assume liability upon the terms that he was to have such security, and despite the fact that his co-sureties did not know of its existence (*Steel v. Dixon* (1881), 45 L.T. 142). On the other hand, the principal creditor is not entitled to the benefit of collateral securities given in this manner by the principal debtor (*Re Walker, Sheffield Banking Co. v. Clayton* (1892), 1 Ch. 621).

§ 7.—Discharge of the Surety.

It is important to consider in what various modes a surety may be discharged from his liability. Certain matters will avoid the contract from its very inception; such matters are fraud, alteration of the written instrument containing the contract, failure of consideration, or the breach of a condition.

(a) By Fraud.

Fraud will, of course, vitiate the contract, and may consist either in the suppression or concealment of what is true, or in the assertion of what is false.

As regards suppression or concealment, it must be noticed that the contract of guarantee is not, before it is entered into, a contract *uberrimæ fidei* in the same sense as are certain other contracts (such as those of marine insurance), in which even an innocent suppression of a material fact will vitiate the contract.

In order that the mere concealment of a material fact may vitiate a contract of guarantee, it must be shown that the concealment is fraudulent; and what is or is not fraudulent in any particular case will depend, to some extent, on the circumstances of that case. In order that concealment may be fraudulent it must be wilful and intentional; but not every concealment which is wilful and intentional is fraudulent. There are certain matters which it is the duty of the creditor to disclose to the surety of his own free will; and there are other matters which he is not bound to disclose, unless he is questioned on the point. If, then, the creditor wilfully and intentionally conceals one of these matters which it is his duty to disclose, this is a fraudulent concealment and the contract is void *ab initio*; but if the surety fails to ask a question on a point which it is not the duty of the creditor to make known, then concealment of the matter, though wilful and intentional on the part of the creditor, does not relieve the surety from liability. Lord Chelmsford, in the case of *Wythes v. Labouchere* ((1858), 3 De G. & J. 593, 607), said:

"The concealment must be of some material part of the transaction itself between the creditor and his debtor to which the suretyship relates. The creditor is under no obligation to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction in which he is about to engage, which will render his position more hazardous."

It has been held that the creditor is bound to inform the surety of any private bargain between the debtor and the creditor by which the degree of liability of the surety is affected, as, for instance, in a guarantee for the payment of goods supplied, that the goods are to be charged at an increase on the market price in order to liquidate an old debt (*Pidcock v. Bishop*

(1825), 3 B. & C. 605). Where the guarantee is for the due performance of the duties of an office, the employer is bound to communicate misconduct already committed in the same office (*Smith v. Bank of Scotland* (1812), 1 Dow. 272).

(b) Misrepresentation.

It is plain that actual misrepresentation of material facts, whether verbal or written, will always release the surety; and it must be noticed here that in a written document concealment of a material fact may amount to misrepresentation, if the effect of the concealment is to make the actual statements in the document false (*Lee v. Jones* (1864), 17 C.B. (N.S.) 482).

(c) Variation of the Agreement.

An alteration of a material character, by a party to the instrument of guarantee, after execution, will discharge the surety.

A joint and several bond of suretyship was entered into by four persons, the liability of two of them being limited by the instrument to £50 each, and that of the others to £25 each. After three of them had duly executed the bond, the fourth, who should have been liable to the extent of £50, executed the bond with an addition to his signature of the words "liable for £25 only." This effected so material an alteration that the first three executants were discharged, and the other party himself was not bound, since he executed the bond as a joint and several instrument only (*Ellesmere Brewery Co. v. Cooper* (1896), 1 Q.B. 75).

A surety may be discharged from liability by the conduct of the creditor, as where the creditor varies the terms of the contract with the principal debtor or with the surety himself. The alteration must be a material one, and what is material will be a question of fact in each case.

In the case of *The General Steam Navigation Co. v. Roll* ((1859), 6 C.B. (N.S.) 550), B. contracted to build a ship for

A., the contract money to be paid by instalments as the work reached certain stages of completion, and C. became surety for the due performance of such work by B. A. allowed B. to draw a large portion of the last two instalments before they were due; and C. was in consequence held discharged.

A similar decision was given in *Midland Motor Showrooms, Ltd v. Newman* ((1929), 167, L.T. 373).

A. had a motor car from B. under a hire purchase agreement, the due performance of the agreement being guaranteed by C. B. for valuable consideration gave A. further time for payment of one of the instalments. It was held that this variation was sufficient to discharge C. from liability.

An instance of a surety being discharged by a variation of the agreement with the surety is the case of *Bacon v. Chesney* ((1816), 1 Stark. 192).

If A. guarantees payment for goods supplied by B. to C., upon condition that 18 months' credit is given, A. is discharged if B. only gives 12 months' credit.

If A. guarantees for goods supplied to B. "of Luton," and B. subsequently removes his business to Finchley, the liability of A. is discharged (*Spencer, Turner & Boldero v. Lotz* (1916), 32 T.L.R. 373).

The surety may also be freed owing to the terms of the agreement not being complied with.

Thus, a guarantee to a bank for an overdraft was, on its face, intended to be a joint and several guarantee by four guarantors. Three out of the four signed the guarantee, but the fourth did not sign, though willing to do so, and died without doing so. The three who signed were not liable on the guarantee (*National Provincial Bank of England v. Brackenbury* (1906), 22 T.L.R. 797).

Again, a debtor promised to repay to the plaintiff an advance within three months of the receipt by him of a written notice requiring payment, and the defendant agreed to guarantee the repayment of the advance as per agreement. The principal debtor died leaving no estate, and neither probate nor letters of administration were taken out. No written notice requiring payment was ever given. The guarantor was not liable, because the condition on which the money became payable had not been fulfilled (*Rickaby v. Lewis* (1906), 22 T.L.R. 130).

The surety is discharged if the creditor takes a further security in lieu of the original security, but not if the additional security is purely collateral.

(d) Failure of Consideration.

Failure of consideration will release the surety, as where the consideration for the promise is the exercise of forbearance, and this forbearance is not exercised.

(e) Revocation.

A surety may in some cases revoke the guarantee. Before actual acceptance the offer of guarantee may always be revoked; after acceptance it can only be revoked in accordance with a stipulation in the original contract. In the case of a continuous guarantee, where the consideration for the guarantee is to take the form of separate advances of money or goods, the offer may be at any time revoked as regards future advances; but where the consideration has been given once and for all, there is no power to revoke (*Lloyd's v. Harper* (1880), 16 Ch. D. 290):

(f) Agreement.

The substitution of a new agreement for the former one before any breach of the first, releases the surety, but any alteration or amendment of the terms of the original agreement must be in writing. If, however, the original agreement is wholly waived or abandoned, such waiver or abandonment need not be in writing.

(g) Death of the Surety.

The death of a surety does not affect liability for *past* transactions. As regards its effect on subsequent transactions, this will depend on whether the surety

had himself the power of revocation. If he could himself have revoked his guarantee by giving notice, then, but not otherwise, express or constructive notice of his death will operate as revocation (*Coulthart v. Clementson* (1879), 5 Q.B.D. 42). Under a joint and several continuing guarantee, the death of one co-surety does not determine the future liability of the survivors, unless they have given express notice to the creditor terminating their liability.

(h) Discharge of Principal.

If the creditor discharges the principal absolutely, he also discharges the surety (*Commercial Bank of Tasmania v. Jones* (1893), A.C. 313).

In *Hewison v. Ricketts* ((1894), 63 L.J. Q.B. 711), the defendants guaranteed the payment by G. of certain instalments under a hire-purchase agreement. Upon default the plaintiffs seized the goods, and so determined the hire-purchase contract. The surety was also discharged.

The surety may, by express contract, remain liable, even though the principal debtor is discharged and although the surety is released by an absolute and unconditional release of the debtor, yet if the remedy against the surety is reserved, the surety still has his rights against the principal debtor, and may have recourse to him. There is, in such a case, really no discharge for the principal debtor; it is not a release, but a covenant not to sue (*Malby v. Carstairs* (1828), 24 L.J. Q.B. 130).

If the creditor, without the consent of the surety, enters into an agreement of a binding character with the principal debtor to give further time for payment, the surety is discharged. Such an agreement must, of course, be enforceable at law, i.e., under seal or for valuable consideration. Mere omission to enforce

payment from the principal debtor will not operate to release the surety. The agreement must also be made with the principal debtor, and not with a stranger; and there must be an actual extension of the credit. The renewal of a bill without the consent of the indorsers may release them.

If the creditor, while giving time to the principal debtor, intends to reserve his rights against the surety, this must, as a rule, appear upon the face of the instrument giving time.

Valid payment by the original debtor will, of course, discharge the surety; and in some cases it is possible for the surety to obtain the benefit of the doctrine of the appropriation of payments, by claiming that payments made by the principal were on account of the debt for which the surety is liable. A surety may also plead to set off a debt due from the creditor to the principal debtor.

(j) Negligence of Creditor.

The surety may also be discharged by the negligence of the creditor in not doing something which he is bound to do for the protection of the surety.

Thus, in *Watts v. Shuttleworth* ((1860), 7 H. & N. 353), in the agreement between the plaintiff and the principal debtor, there was a condition imposing upon the plaintiff the duty to insure against fire the work which was being done for him by the debtor. When the surety assumed liability for the due performance of the work, he was informed of this stipulation. The plaintiff did not insure, and the surety was discharged by the plaintiff's omission to do so.

The omission by the creditor of some act which he is not legally bound to do, does not operate to discharge the surety.

The surety being, on payment, entitled to the benefit of all securities held by the creditor against the principal debtor, it follows that if, through the fault of the creditor, there is a loss of such securities, the surety will be discharged to the extent of such securities. It must be shown, however, that there has been an actual loss, and that the loss arose from the fault of the creditor. A similar position would arise if the creditor's *actions* caused the surety to lose a lien to which he was entitled.

In the case of a *continuous* guarantee for the honesty of a servant, the surety is discharged if the employer retains the servant in his employ after discovering that he has been guilty of some dishonesty, unless the servant is so retained with the consent of the surety (*Phillips v. Foxall* (1872), 7 Q.B. 666).

(k) Lapse of Time.

The surety may be released from liability by the operation of the Statutes of Limitations; in the case of a parol contract after six years, in the case of a guarantee under seal after twelve years. A payment made by one co-surety will not keep the debt alive against the others (*Re Wolmershausen, Wolmershausen v. Wolmershausen* (1889), 62 L.T. 541); but if a payment of interest in respect of a loan to a firm is made by one of several partners, after the retirement of one of them, the debt is prevented from becoming barred as against the retired partner, since the continuing partners are assumed to have been acting for him and as his agents (*Re Tucker, Tucker v. Tucker* (1894), 3 Ch. 429, (C.A.)).

§ 8.—Stamping.

An instrument of guarantee is not available for any purpose whatever, and cannot be given in evidence,

unless it is properly stamped. But a guarantee in writing for the payment of goods, afterwards to be purchased by a third person to a certain amount, does not require stamping, since it comes within the exceptions of the First Schedule of the Stamp Act, 1891, as being an agreement for or relating to the sale of goods.

If the subject matter of the guarantee is of the value of £5 or more, a written guarantee not under seal requires a sixpenny stamp, as an agreement. Any guarantee under seal requires a ten shilling stamp, as a deed.

SYNOPSIS OF CHAPTER VI

INSURANCE

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CHAPTER VI

INSURANCE

§ 1.—Nature of the Contract of Insurance.

A contract of insurance is one having for its object the indemnification against loss, or the payment of a lump sum upon the happening of a certain event. The principal forms of insurance are life, fire and marine; fire and marine insurance being contracts of indemnity, life insurance being a contract for a lump sum. Almost any risk, however, can be made the subject of a contract of insurance, and, in particular, accidents, employers' liability, and burglary are very commonly insured against.

The parties to a contract of insurance are the *insurer*, who is sometimes known as assurer or underwriter, and the *insured*. The insurer is the person taking the risk, and agreeing to indemnify or pay a lump sum down on the happening of a particular event; and the insured is the person paying the premium for the consideration of the contract, in order that he may be indemnified or receive payment. The contract is generally evidenced by an instrument known as a policy.

The distinction between a contract of insurance and a mere wagering contract is important, since there is very little difference between speculating as to whether a horse will win a certain race, or whether a particular ship will be lost or not upon a given voyage. The difference between these cases is that, as regards a wager, the parties to the agreement

suffer no loss or detriment, whatever the result may be; whereas in the case of a valid contract of insurance the insured is bound to show that he has an INSURABLE INTEREST.

In *Wilson v. Jones* ((1867), 2 Ex. 150), an insurable interest was defined as follows:—"If the event happens, a party will gain an advantage; if it is frustrated, he will suffer a loss."

This cannot be regarded as an entirely satisfactory definition, since the loss against which the insurance is effected generally arises in consequence of the happening of some event, *e.g.*, fire or collision at sea, rather than its frustration which would merely operate to preserve the *status quo*. Perhaps a better judicial statement is that an insurable interest exists where the insured is "so circumstanced with respect to it (the subject-matter of the policy) as to have benefit from its existence, prejudice from its destruction" (*Lucena v. Craufurd* (1806), 3 Bos. and P. 101).

Neither a shareholder nor a simple creditor of a company has an insurable interest in any particular asset of the company (*Macaura v. Northern Assurance Co., Ltd.* (1925), A.C. 619). If policies are merely wagering agreements, the Court will not enforce them (*Gedge v. Royal Exchange Assurance Corporation* (1900), 2 Q.B. 214); and moreover the premiums cannot be recovered (*Howard v. Refuge Friendly Society* (1886), 54 L.T. 649).

A contract of insurance is one of the class *uberrimæ fidei*, the result being that upon the contract being negotiated all material facts within the knowledge of the parties must be disclosed, otherwise the contract may be rescinded by the party to whom disclosure should have been made. This rule applies to all classes of insurance contracts, and is binding upon an

agent equally with a principal. The test as to the materiality of a particular fact is whether or not such fact, if disclosed, would have influenced a reasonable underwriter to decline the risk, or to have stipulated for a higher premium (*Mutual Life Insurance Co., of New York v. Ontario Metal Products Co. Ltd.* (1925), A.C. 344).

When it is stated in the policy that "the proposal shall be the basis of the contract and incorporated therein," the truth of the statements contained in the proposal becomes a condition precedent to the liability of the insurer, altogether apart from the question of the materiality of such statements (*Dawsons Ltd. v. Bonnin* (1922), 2 A.C. 413). If the contract is entered into by an agent of the insured, non-disclosure by the agent, even though the principal did not know of the particular fact which ought to have been disclosed, will render the contract void (*Blackburn Sons & Co. v. Haslam* (1881), 21 Q.B.D. 144).

Disclosure to an agent of the insurer is not sufficient to bind the latter if the particular fact is not disclosed in the proposal form, which forms the basis of the contract.

In *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.* ((1929), 168 L.T. 10), the proposal form contained the usual warranty that the answers to the questions were true and that they formed the basis of the contract. The insurance company successfully repudiated liability on the ground that the form contained incorrect statements of a material character despite the fact that the true circumstances were known to their agent who had, in fact, filled in the form.

A false statement upon a proposal form for a fire insurance policy, that the proposal had not previously been refused by any other office, is a concealment

of a material fact which would render the policy void (*Arthrudd Press Ltd. v. Eagle, Star and British Dominions Insurance Co., Ltd.* (1924), 158 L.T. 88); and this would be so even where the proposal previously refused was in respect of a motor policy while the present proposal related to a fire policy (*Cocker & Woolfe, Ltd. v. Western Australian Insurance Co.* (1936), 1 K.B. 408).

The refusal of a proposal made by one of the partners in a firm on his own behalf, is a material fact which must be disclosed in any proposal on behalf of the partnership (*Glicksman v. Lancashire and General Assurance Co.* (1927), A.C. 139).

Recovery under a policy would also not be possible where the proposal form, the truth of the statements therein being warranted by the insured, contained a misstatement inserted by the clerk of the insurance broker who had filled up the printed form of proposal to be used. The clerk was deemed, in such case, to be the agent of the insured (*Farrell v. South East Lancashire Insurance Co.* (1933), 1r.R. 36).

Non-disclosure in the proposal form relating to the insurance of a motor car (such form containing the usual clause as to disclosure) that during the previous three years another car belonging to the insured had been removed on three occasions, but in each case had been recovered within a few hours, was held to be material so as to entitle the insurers to avoid the policy (*Farra v. Hetherington* (1931), 47 T.L.R. 465).

If a material alteration of the risk arises between the date of the proposal and the issue of the policy, notice must be given to the insurer, otherwise he will be entitled to avoid the contract (*Looker v. Law Union and Rock Insurance Co., Ltd.* (1928), 1 K.B. 554).

If an assured has in view a particular and unusual risk which is not brought to the notice of his underwriters, that risk is not covered by general words which are, on the face of them, wide enough to cover such risk (*Cheshire & Co. v. Thompson* (1919), 35 T.L.R. 191).

REINSURANCE is the act of insuring a risk by an insurer who has already made himself liable in respect of it. Misrepresentation of any facts for the purpose of obtaining a reinsurance will vitiate the contract.

Reinsurance is resorted to where the insurer has made himself responsible for a risk which he considers too great to carry, and arrangements are made by means of "treaties" with other insurance companies or underwriters for a specified proportion of the risk to be taken over by the latter in consideration of payment of a part of the premium received. Certain companies restrict their activities to undertaking reinsurance business. Risks of considerable magnitude are thus undertaken directly or indirectly by several insurers. It must be noted, however, that the insured looks only to the insurer who has issued the policy; it is for the latter to recover from the reinsurers the due proportion of the amount of the loss sustained.

If the insurer successfully resists a claim by the insured, but is unable to recover his costs, he cannot claim to be reimbursed proportionately by the reinsurer unless there is a special term in the treaty to that effect, as the loss was not one for which the insurer (and consequently the reinsurer) was liable (*Scottish Metropolitan Assurance Co., Ltd. v. Groom* (1923), 157 L.T. 511).

DOUBLE INSURANCE arises where a person effects more than one insurance with different insurers for the same risk and interest. If a loss be incurred, he can only recover to the extent of such loss, so far as the contract of insurance is a contract of indemnity. He may, however, recover from whichever of the insurers he chooses, and the one who so pays him will have a right of contribution against the other insurer. If the insured receives any excess, he must hold it in trust for the insurers to whom it is due (*Kidston v. Empire Insurance Co.*, 1. C.P. 535). This does not apply to life assurance, which is not a contract of indemnity so that a person can insure his life to any amount which will be recoverable in full from *all* the insurers with whom policies have been effected.

The principle of double insurance is not restricted to cases where a person has taken out two policies in respect of the same risk, but applies also where the same risk is covered under two policies issued to different parties by different insurers.

An insurance company issued a policy to A. indemnifying him against liability for injury caused by his car. The insurance covered any injury or damage caused by a relative or friend of A. whilst driving the car with A.'s general knowledge and consent, provided that such person was not himself already covered by insurance. Another insurance company issued to B. a policy which covered him when driving a car not belonging to him, if he had no indemnity under any other insurance. Whilst driving A.'s car, B. injured C. It was held that the first-named company (against which the action was brought) was liable to indemnify B. to the extent of one-half of his liability to C. (*Weddell v. Road Transport and General Insurance Co., Ltd.* (1931), 172 L.T. 385).

§ 2.—Life Assurance.

In a contract of life assurance the insurer undertakes to pay to the person for whose benefit the contract is entered into a sum of money or an annuity,

upon the death of the person whose life is insured, in consideration of one premium or certain annual premiums paid to him.

In the case of an *endowment* policy, the liability of the insurer accrues either on the death of the insured or at a specified date, whichever is first in point of time.

To prevent life assurance being made the subject of gaming transactions, the Life Assurance Act, 1774, was passed, and the following are important sections of that Act :—

1. No insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering, and every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.

2. It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwritten.

3. In all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

It is not essential that the interest should exist except at the time the policy is made (*Dalby v. India & London Life Insurance Co.* (1854), 15 C.B. 365). It is therefore not necessary that an assignee of the policy should have any insurable interest; it is sufficient that the insurable interest of the assignor actually existed at the time of making the contract (*Ashley v. Ashley* (1829), 3 Sim. 149).

A creditor may insure his debtor's life for a sum equal to the debt owing to him, and will have insurable interest to that extent (*Godsall v. Boldero*, 2 Sm. L.C. 10th Ed. 254); and the insurance will hold good even though the debt itself is extinguished before the maturity of the policy.

A wife has an insurable interest in the life of her husband (*Reed v. Royal Exchange Assurance Co.*, Peake, Add. Ca. 70); and a husband in that of his wife (*Griffith v. Fleming* (1908), 24 T.L.R. 700).

A man may always insure his own life for his own benefit (*McFarlane v. Royal London Friendly Society* (1886), 2 T.L.R. 755), but a father has not as a rule an interest in the life of his son (*Halford v. Kymer* (1830), 10 B. & C. 725).

A married woman may effect an insurance upon her own life or that of her husband for her separate use (Married Women's Property Act, 1882, § 11).

A sister has an insurable interest in the life of her brother to the extent of his funeral expenses if she has a *bonâ fide* expectation of having to meet those expenses (*O'Brien v. Irish National Insurance Co.* (1932), W.C. & I. Rep. 532).

Life assurance policy moneys cannot be claimed from the assurance companies if the assured commits suicide while sane. This will be so, even if the policy provides that the moneys shall be payable in such an event, for to allow the personal representatives to recover the fruits of the deceased's crime is against public policy (*Beresford v. Royal Insurance Co. Ltd.* (1938), A.C. 586).

If a man or a married woman insures his or her life or each other's lives, and the policy is expressed to be for the benefit of the other party or of the children, the

proceeds of the policy will not form part of the estate of the insured, nor be subject to the payment of his debts. If, however, it is proved that the policy was entered into for the purpose of defrauding creditors by the payment of premiums, they will be entitled out of the proceeds to a sum equal to the premiums paid.

By § 3 of the Industrial Assurance Act, 1923, it is provided that collecting societies and industrial assurance companies may issue policies of assurance to ensure money to be paid for the funeral expenses of a parent, child, grandparent, grandchild, brother or sister. This provision covers a policy issued in respect of the funeral expenses of an illegitimate child (*Morris v. Britannic Assurance Co. Ltd.* (1931), 171 L.T. 231).

The term "industrial assurance" is applied where life policies are issued the premiums for which are received by means of collectors and are payable at intervals of less than two months (§ 1). Where policies are taken out in respect of the life of a child, they must not be for sums in excess of £6 for children under three years of age, £10 for children up to six years of age, and £15 for children up to 10 years of age (§ 4). If a policy is issued in contravention of the Act, the insurance society or company is liable to pay to the owner of the policy a sum equal to the surrender value of the policy or, if the policy has been issued after the commencement of the Act, a sum equal to the amount of the premiums paid, unless the illegal issue was due to a false representation on the part of the proposer, or the company can show that it did not know the policy was illegal or beyond their legal powers (§ 5).

A life policy may be assigned under the provisions of the Life Insurance Act, 1867, by indorsement of the policy or by a separate instrument. Written notice must be given to the insurer, and the insurer must give a certificate acknowledging receipt of such notice. The assignee takes subject to equities in any case, i.e., any defence which would have been good against the assignor is good against him.

If a policy is taken out for a period only, and is then assigned, and before the expiration of such period it is renewed, the question arises as to whether the rights of the assignee extended to the renewed policy.

In *Royal Exchange Assurance v Hope* ((1928), Ch. 179), the assigned policy was originally issued for a period of twelve months and was renewed for a further term of three months. The policy was altered by indorsement of the extension, no new policy being issued. The insured died within the extended period, but it was held that the policy money belonged to the assignee and not to the deceased's estate, as there was evidently an intention to extend the original contract and not to rescind it and enter into a fresh one.

By means of the assignment of the policy a person may insure his life, and transfer the policy to a third party, whereas in all probability such third party could not have insured the assignor himself in the first place, owing to want of insurable interest. So long as the insurable interest exists when the contract is entered into, the assignee is not bound to prove any interest of his own.

Life assurance companies are controlled by the Assurance Companies Act, 1909, and under this Act it is necessary for such companies to deposit £20,000 with the Paymaster-General of the High Court. Formerly, this deposit could be withdrawn when the life fund of the company had accumulated to £40,000; but any existing company that had withdrawn this

deposit, under the 1870 Act, must repay it under the 1909 Act, and it must be left, in all cases, while the company is under any liability in respect of life assurances. It has been decided in the case of *Forsikringsaktieselskabet National of Copenhagen v. Att.-Gen.* ((1925), A.C. 639), that a company that only carries on reinsurance business is governed by the Act and must make the statutory deposit.

A life assurance company, like all other companies, is only capable of entering into contracts which fall within the scope of its Memorandum of Association, and if any contracts were made which were *ultra vires*, the company would not be bound by them.

§ 3.—Fire Insurance.

A contract of fire insurance is a contract whereby the insurer agrees to indemnify the insured against loss by fire, in respect of the subject-matter of the policy, for a consideration consisting of a premium paid by the insured. The contract is purely a contract of indemnity, and the party suffering the loss can only recover to the extent of the loss, so far as it does not exceed the sum insured. It is therefore no benefit to a person having fully insured the property to insure further, since this would be a double insurance, and would operate merely for the benefit of the insurers, as already explained. In the case of damage to buildings by fire, the amount recoverable is the cost of repairs when allowance has been made for the excess of the value of the new buildings over the old ones (*Vance v. Forster* (1841), 1r. Circ. Cas. 47).

The insured must have an insurable interest, and this will generally exist to the extent of any right or interest in respect of the subject-matter of the insurance.

The insurable interest must exist *at the time of the loss* if a claim is to be supported and, it is generally considered, that in the case of buildings the interest must also have existed at the time the contract of insurance was entered into.

A man can always insure his own property ; a trustee may insure the trust property ; and a mortgagee may insure the mortgaged property (*Westminster Fire Office v. The Glasgow Provident Investment Society* (1888), 13 App. Cas. 699) ; but a shareholder of a company has no insurable interest in the property of the company even though he holds practically the whole of the shares (*Macaura v. Northern Assurance Co., Ltd.* (1925), A.C. 619).

If a contract of fire insurance is entered into by an agent without authority, the insured cannot ratify after he becomes aware of a loss of the subject-matter of the insurance (*Grover v. Matthews* (1910), 2 K.B. 401).

As in other cases of insurance, all material facts must be disclosed.

By the Fires Prevention (Metropolis) Act, 1774, § 83, which was an Act passed "in order to deter and hinder ill-minded persons from wilfully setting their houses or other buildings on fire, with a view of gaining to themselves insurance money," it was provided that if a building is burned down, any interested person may require the insurance money to be laid out in rebuilding the premises. The provisions of this Act are not confined to the Metropolitan area, but have universal application in England.

Under the Metropolitan Fire Brigade Act, 1865, damage caused by members of the Metropolitan Fire Brigade, in the due execution of their duties, is deemed

to be damage by fire within the meaning of any policy of insurance against fire.

If the policy contains an **AVERAGE CLAUSE**, the assured can only recover such proportion of any loss as the amount insured bears to the whole value of the property insured, *i.e.*, if the property is insured for less than its true value, the whole loss, even though less than the total sum insured, cannot be recovered. For example, suppose A. insures buildings worth £10,000 for £1,000 and suffers damage to the extent of £1,000. If the policy contains an average clause, A. can only recover £100. But if there is no average clause, A. can recover the whole damage he has suffered up to the extent of the amount insured, *i.e.*, £1,000.

Where the insurer has paid what is due from him under the policy, upon the occasion of a loss, he is entitled by the doctrine of subrogation to every legal and equitable right of the insured, whether such right arises out of contract or tort.

A. purchased a house from B. The vendor had insured the house, but this fact was not mentioned in the contract of sale. After the contract had been entered into, but before the actual conveyance to the purchaser, the house was burned, and the vendor recovered the damage from the insurance company. He subsequently recovered also the full purchase-money from the purchaser, who remained bound by the contract for the sale to him of the land. The vendor was held liable to return to the insurance company the money received from them, as he had suffered no loss by reason of the fire (*Castellain v. Preston* (1883), 11 Q.B.D. 380).

It is now provided by section 47 of the Law of Property Act, 1925, that in the case of a contract for the sale or exchange of property, if money becomes payable under a policy of insurance maintained by the vendor in respect of any damage to the property,

such money is to be paid by the vendor to the purchaser on completion of the contract. This, in effect, assigns to the purchaser the benefit of the vendor's policy of insurance. The application of the provision is subject to any contrary stipulation in the contract of sale, to any requisite consents of the insurers, and to allowance by the purchaser of a proportionate part of the premium.

A fire insurance policy may be assigned only with the consent of the insurance office (*Saddlers' Company v. Badcock* (1743), 2 Atk. 554); and if this is not obtained, the insurance will not follow the property upon a change of ownership.

Fire insurance companies are governed by the Assurance Companies Act, 1909. Where a company commences business after the 1st July, 1910, it must make a deposit with the Paymaster-General of £20,000. If a company undertakes both life and fire insurance, a separate deposit must be made in respect of each fund.

§ 4.—Marine Insurance.

The risk in a contract of marine insurance is undertaken by a person called an underwriter, the terms being arranged between him and the insured by an insurance broker. The principal body of underwriters is the Corporation of Lloyd's.

Every underwriter at Lloyd's, before he can commence business, is required to make a minimum deposit with the Committee of Lloyd's of £5,000, which is held in trust specifically for outstanding marine risks. In addition to this his accounts are subject to a yearly audit by a professional accountant, approved by the Committee, who must certify the

result of his audit to the Committee, in accordance with the requirements of the Assurance Companies Act, 1909, Sch. VIII.

The fact that much of the marine insurance business is undertaken by underwriters at Lloyd's does not preclude insurance companies from issuing policies in respect of marine risks. On the other hand, the activities of underwriters are not restricted to marine insurance ; risks of all kinds (except life) are frequently insured against by them.

The law relating to marine insurance has been codified by the Marine Insurance Act, 1906.

(a) Definition and Extent of Marine Insurance.

The Act defines a contract of marine insurance as a contract whereby the insurer undertakes to indemnify the insured, in manner and to the extent thereby agreed, against the losses incident to marine adventure (§ 1).

A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the insured against losses on inland waters or on any land risk incidental to a sea voyage (§ 2 (1)).

(b) The Policy and its Terms.

Particulars of the insurance are first entered by the insurance broker upon a "slip," which is the foundation of the contract. If there is a stamped policy in existence, the slip may be referred to in legal proceedings in order to arrive at the true terms of the contract. But although the slip can be used for this purpose, it does not itself form any legal contract ; and a liquidator of an insurance company which has initialled slips is not entitled to issue policies to

the holders (*Clyde Marine Insurance Co. Ltd. v. Renwick & Co.* (1924), S.C., 113).

The Act contains a form of policy in its First Schedule, and defines therein the meaning of the various terms contained in the policy.

(1) *The form of the Policy.*

The form of policy given in the Appendix to the Marine Insurance Act, 1906, is as follows :—

FORM OF POLICY.

BE IT KNOWN THAT as well in Lloyd's
own name as for and in the name and names of all and every other H.G.
person or persons to whom the same doth, may, or shall appertain, Policy.
in part or in all doth make assurance and cause
and them, and every of them, to be insured, lost or not
lost, at and from

Upon any kind of goods and merchandises, and also upon the body,
tackle, apparel, ordnance, munition, artillery, boat, and other furniture
of and in the good ship or vessel called the

whereof is master under God, for this present voyage,
or whosoever else shall go
for master in the said ship, or by whatsoever other name or names the
said ship, or the master thereof, is or shall be named or called ; beginning
the adventure upon the said goods and merchandises from the loading
thereof aboard the said ship,
upon the said ship, &c.

and so shall continue and endure, during her abode there, upon the
said ship, &c. And further, until the said ship, with all her ordnance,
tackle, apparel, &c., and goods and merchandises whatsoever shall
be arrived at

upon the said ship, &c., until she hath moored at anchor twenty-four
hours in good safety ; and upon the goods and merchandises, until
the same be there discharged and safely landed. And it shall be lawful
for the said ship, &c., in this voyage, to proceed and sail to and touch
and stay at any ports or places whatsoever

without prejudice to this insurance. The said ship, &c., goods and
merchandises, &c.. for so much as concerns the assured by agreement
between the assured and assurers in this policy, are and shall be valued
at

Touching the adventures and perils which we the assurers are con-
tented to bear and do take upon us in this voyage : they are of the seas,

men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainerments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of

IN WITNESS whereof we, the assurers, have subscribed our names and sums assured in London.

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent. unless general, or the ship be stranded.

(2) *Definitions and Explanations.*

The following definitions and explanations are important in connection with the policy :—

(a) S. G.

A marine policy bears on it the letters S. G., as to the exact meaning of which there is some dispute. It is commonly said that they mean "Ship and Goods"; but the more probable explanation is that they stand for "*Salutis Gratia*," i.e., "For the sake of safety."

(b) PARTIES AND SUBJECT-MATTER.

The policy contains the names of the insurers and of the insured, and a declaration of insurance. It states the port from which the risk commences.

(c) AT AND FROM.

Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage.

If a ship be insured "at and from" a particular place, and she be at that place in good safety when the contract is concluded, the risk attaches at once; if she be not at the place when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

(d) LOST OR NOT LOST.

If the subject-matter be insured "lost or not lost," and the loss has occurred before the contract is concluded, the risk attaches unless, at such time, the insured was aware of the loss, and the insurer was not.

(e) NAME OF SHIP AND MASTER.

The policy states the name of the ship and the name of the master.

(f) COMMENCEMENT AND DURATION OF RISK.

If goods or movables are insured "from the loading thereof," the risk does not attach till such goods or movables are actually on board; and the insurer is not liable for them while in transit from the shore to the ship.

If the risk continues till the goods are safely landed, they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge.

(g) PORTS OF CALL.

The policy may enumerate the ports at which the ship may call; or it may give leave "to proceed and sail to, and touch and stay at, any ports or places whatsoever"; but this will only mean the usual ports of call on the particular voyage, and will not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination. (*See* rules as to deviation, § 4 (l).)

(h) AMOUNT OF INSURANCE.

The amount of the insurance is then stated. (As to the difference between an open and a valued policy, *see* § 4 (j).)

(j) RISKS.

The risks covered by the insurance are then enumerated; and they correspond to the "excepted risks" in a charter-party or bill of lading, *i.e.*, the risks in respect of which the shipowners disclaim liability. They include "perils of the sea," that is, fortuitous accidents or casualties of the sea, but not the ordinary action of the winds or waves.

Other perils covered are—

Men of War.

Fire.

Enemies.

Pirates.

This includes passengers who mutiny, and rioters who attack the ship from the shore.

Rovers.

Thieves.

This does not cover clandestine thefts, either by one of the crew or by a passenger.

Jettisons.

A jettison is the wilful throwing overboard of any movable, in order to save the vessel.

Letters of Mart and Countermart.

These were authorities which were formerly issued to private adventurers in time of war, empowering them to seize the ships and goods of subjects of the hostile power.

Surprisals.

Takings at Sea.

Arrests.

Restraints and detainments of all Kings, Princes and People.

This only refers to a political or executive act, and does not cover a loss caused by a riot or ordinary judicial process, so that it will not cover detention under an Admiralty warrant.

Barratry of the Master and Mariners.

This includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner or charterer. But no act is barratrous which is committed with the connivance or consent of the owner (*P. Samuel & Co. Ltd. v. Dumas* (1924), A.C. 431).

All other perils, losses, and misfortunes, but only perils similar in kind to those specifically mentioned in the policy.

(k) SPECIAL CLAUSES.

The policy contains other clauses which may vary in nature from time to time. The effect of some of these clauses is to limit the liability of insurers; such are, the "Memorandum," the "F.P.A. Clause," the "Suez Canal Clause," the "Free of capture, seizure and detention Clause."

Others, such as the "Suing and Labouring Clause," the "Running-down Clause," the "Owner's Risk Clause," the "Inchmaree Clause," and the "Continuation Clause" extend the liability.

(l) THE MEMORANDUM.

The Memorandum is intended to free the underwriters from liability for loss arising through natural and inevitable deterioration on the voyage ; it runs as follows :—

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides, and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent. unless general, or the ship be stranded.

The effect of this clause is that with regard to the first named class of goods, the underwriter repudiates all liability for partial loss or damage ; as to the second class of goods, he is only to be liable for loss or damage where such loss is in excess of five per cent. ; and in the case of the ship and freight, and all other goods, in excess of three per cent. ; but he agrees to be liable for all loss or damage if the ship be stranded, or if there be a claim for general average. Where the loss or damage is in excess of the prescribed limits, the underwriter is liable for the whole amount and not merely the amount over the limit. It should be noted that where articles are separately enumerated (*e.g.*, sugar, flax, hides), in calculating the deterioration each article must be considered separately ; but where classed under “All other goods,” the deterioration is calculated on the whole together.

(m) STRANDING.

As to what is a “stranding,” so as to render the underwriters liable, no settled rules can be laid down, but each case must stand by itself ; it has been defined as “a taking of the ground by the vessel, which does not happen solely from those natural causes which are necessarily incident to the ordinary course of the

navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause" (*Kingsford v. Marshall* (1832), 8 Bing. 464).

(n) SUEZ CANAL CLAUSE.

In the case of vessels passing through the Suez Canal, it is specially stipulated that a taking ground in the canal is not to be a stranding so as to render the underwriters liable, but the underwriters are to pay any damage or loss which may be proved to have directly resulted therefrom.

(o) F.P.A. CLAUSE.

Another mode of limiting liability is by the F.P.A. (Free of Particular Average) clause, which applies to a cargo consisting of many separate items; i.e., bales, bags, parcels, etc. In these cases the underwriters refuse liability for any other than a total loss except where there is a general average loss, though the exemption may be qualified by other clauses in the policy, e.g., loss resulting from stranding. It is commonly agreed, however, that the underwriters should be liable for partial loss arising in respect of a specified number of the parcels shipped, 5, 10, 50 or more, as the case may be. This is described as "average payable on series."

The underwriters will, in any event, be liable to pay special charges for warehousing, forwarding, etc., and be responsible for partial loss arising from transhipment of the goods.

(p) FREE OF CAPTURE, ETC., CLAUSE.

It is now a very common practice to insert in policies a clause "free of capture, seizure or detention"; the effect of which is to modify the

liability of the underwriters for loss arising from "Restraint of Princes." Although the underwriters will still be liable for loss arising through the declaration of a blockade, yet if the ship is actually captured they are freed from liability. "Seizure" would include loss through the ship being seized in a mutiny; "detention" would include an embargo or other arrest.

(q) SUING AND LABOURING CLAUSE.

Among the clauses which extend the liability of the underwriter may be mentioned the "suing and labouring clause." This is an extra inducement offered by the underwriters to the insured for efforts to diminish the liability of the insurers. It authorises "the insured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, etc., or any part thereof,"; and contains a promise of indemnity against extra expense so caused. But this clause will only apply when the suing and labouring take place in order to avoid a peril insured against. For instance, if the policy contained an F.P.A. clause, money expended to avoid a particular average loss would not be recoverable.

It also provides that no acts of this kind, either on the part of the insured or insurers, are to be considered as a waiver, or as an acceptance of abandonment.

(r) RUNNING-DOWN CLAUSE.

By the running-down clause the underwriters agree to be responsible for three-fourths of the amount, calculated at the rate of £8 per ton of the ship's

registered tonnage, for which the owners may be found liable in case of collision, the other fourth remaining at owner's risk. The remaining fourth part can be insured against by an "owner's risk" clause.

(s) INCHMAREE CLAUSE.

By what is sometimes called the "Inchmaree" clause, the underwriters may agree to pay compensation for losses which arise from accidents which are not strictly "perils of the sea"; such as damage to cargo from defects in the engine or pipes while pumping water on board while in harbour.

(t) CONTINUATION CLAUSE.

A time policy will only operate for a period of one year, but the underwriter may be liable beyond that period by virtue of a continuation clause, if the ship is at sea at the expiration of the twelve months, until the ship arrives into port, or for not more than thirty days thereafter.

A policy containing this clause must be stamped with a sixpenny stamp in addition to the usual policy stamp.

(c) The Premium.

Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable; and where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable (§ 31).

(d) Double Insurance.

The rule as to double insurance applies as in the case of other insurances for indemnity (§ 32).

(e) Gaming and Wagering Policies.

Every contract of marine insurance by way of gaming or wagering is void ; and such a contract is deemed to be a gaming or wagering contract—

- (a) Where the insured has not an insurable interest, and the contract is entered into with no expectation of acquiring such an interest ; or
- (b) Where the policy is made “interest or no interest,” or “without further proof of interest than the policy itself,” or subject to any other like term. Such a policy is known as a P.P.I. (“Policy Proof of Interest”) policy. If a policy contains, when issued, a detachable P.P.I. clause which is said not to be a part of the policy, but binding in honour on the underwriters, such a policy is void, whether or not the clause has subsequently been detached by the assured ; and a liquidator is not entitled to admit claims under such a policy (*Re London County Commercial Re-insurance Office Ltd.* (1922), 2 Ch. 67).

A valid policy may be effected “without benefit of salvage to the insurer,” but only where there is no possibility of salvage (§ 4).

(f) Insurable Interest.

Every person has an insurable interest who is interested in a marine adventure, and particularly where he stands in any legal or equitable relation to the adventure, or any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, damage, or detention, or may incur liability in respect thereof (§ 5).

The insured must be interested in the subject-matter insured **AT THE TIME OF THE LOSS**, though he need not be interested when the insurance is effected ; but where the subject-matter is insured "lost or not lost," he may recover, although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the insured was aware of the loss, and the insurer was not.

Where the insured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss (§ 6) ; but if a person has such an interest, he can ratify a policy made on his behalf but without his authority, even when he knows that a loss has occurred (*see* § 4 (*h*)).

A defeasible or contingent interest is insurable (§ 7) ; and so also is a partial interest (§ 8).

The underwriter has an insurable interest in his risk, and may re-insure in respect of it ; but unless the policy otherwise provides, the original insured has no right or interest in respect of such re-insurance (§ 9).

The lender of money on bottomry or respondentia has an insurable interest in respect of the loan (§ 10) ; the master or any member of the crew of a ship has an insurable interest in respect of his wages (§ 11) ; in the case of advance freight, the person advancing the freight has an insurable interest, in-so-far as such freight is not repayable in case of loss (§ 12) ; and the insured has an insurable interest in the charges of any insurance which he may effect (§ 13).

Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full

value thereof; and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage (§ 14 (1)).

The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss (§ 14 (3)).

Although the insured must have an insurable interest in the subject-matter insured, the nature and extent thereof need not be specified in the policy (§ 26 (2)).

(g) Disclosure by the Insured.

The contract being *uberrimæ fidei*, if the utmost good faith is not observed by either party the contract may be avoided by the other party (§ 17). It is therefore essential that all material circumstances within the knowledge of the insured should be disclosed by him to the insurer, before the contract is concluded.

But in the absence of enquiry he need not disclose any circumstances diminishing the risk, or as to which information is waived by the insurer, or which are a matter of notoriety, and therefore presumably known to the insurer, or which it is superfluous to disclose by reason of any express or implied warranty (§ 18).

Where an insurance is effected for the insured by an agent, the agent must disclose to the insurer every material circumstance which is known to himself, and every material circumstance which the insured is bound to disclose, unless it comes to the knowledge of the insured too late to communicate it to the agent (§ 19). Further, the insured or his agent must disclose to

the insurer every material fact which, having regard to the nature of his business, he ought to know. And if he fails to make such disclosure the underwriters are not liable, even though they also might have been aware of such fact in the ordinary course of their business (*London General Insurance Co. v. General Marine Underwriters' Association* (1921), 1 K.B. 104).

Every material representation made by the insured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it is untrue the insurer may avoid the contract.

A representation as to a matter of fact is true if it is substantially correct, and a representation as to a matter of expectation or belief is true if it is made in good faith. A representation may be withdrawn or corrected before the contract is concluded (§ 20).

(h) Ratification.

Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss (§ 86).

(j) Classification of Policies.

(1) *Voyage and Time Policies.*

Where the contract is to insure the subject-matter "at and from," or from one place to another or others, the policy is called a "Voyage Policy"; and where the contract is to insure the subject-matter for a definite period of time, the policy is called a "Time Policy." A contract for both voyage and

time may be included in the same policy (§ 25 (1)), this being described as a "Mixed Policy."

(2) *Valued Policy.*

A valued policy is one which specifies the agreed value of the subject-matter insured (§ 27 (2)). If a total loss occurs, the amount recoverable under a valued policy is the sum for which the ship is so insured, without having regard to her actual value at the time of the loss; and in the absence of fraud or other circumstances vitiating the whole policy, the question of value cannot be reopened.

(3) *Unvalued Policy.*

An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained (§ 28).

(4) *Floating Policy.*

A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration. The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner.

Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration (§ 29).

(k) Warranties.

A warranty, which may be expressed or implied, is an undertaking by the insured that some particular thing shall or shall not be done, or that some stipulation shall be fulfilled, or that a particular state of facts does, or does not, exist. Such an undertaking must be exactly complied with, whether it be material to the risk or not. If it is not so complied with, then subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date (§ 33). A warranty, therefore, in a contract of marine insurance, is substantially the same as a condition in any other contract, and gives the injured party the right to avoid the contract as well as to bring an action for damages.

Non-compliance with a warranty is excused, when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any change in the law. If a warranty is broken, the insured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss; but a breach of warranty may be waived by the insurer (§ 34).

(1) *Express Warranties.*

An express warranty may be in any form of words from which the intention to warrant is to be inferred; it must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

An express warranty does not exclude an implied warranty, unless it is inconsistent therewith (§ 35).

(2) *Implied Warranties.*

Where a ship is expressly warranted "neutral," there is also an implied condition that the property shall have a neutral character at the commencement of the risk, and that the insured will do his best to preserve it; and that if the subject-matter is a ship, she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract (§ 36).

There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk (§ 37).

Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it is safe at any time during that day (§ 38).

In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. This implied warranty can only be excluded by the very clearest words (*Sleigh v. Tyser* (1900), 2 Q.B. 333).

Moreover, since the warranty is an absolute condition, if the ship is lost from some cause totally unconnected with unseaworthiness, the policy will be avoided if in fact the ship was not seaworthy at the commencement of the voyage; and the fact that the insured had no knowledge that the ship was unseaworthy will not avail him (*Quebec Marine Insurance Co. v. Commercial Bank of Canada* (1870), 3 P.C. 234).

Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of, or further, preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure; but where, with the privity of the insured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness (§ 39).

In *Thomas v. Tyne and Wear S.S. Freight Insurance Association* ((1917), 1 K.B. 938), a ship, insured under a time policy, put to sea with her hull in a defective condition, and with an insufficient crew. The insured owner was aware of the latter but not of the former defect. The ship was lost as a result of the defective hull. The insurers were held to be liable, but it should be noted that if the insurance had been effected under a voyage policy where the warranty of seaworthiness is absolute, the insurers could have successfully repudiated liability.

In a policy on goods or other movables there is no implied warranty that the goods or movables are seaworthy, but there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other movables to the destination contemplated by the policy (§ 40).

There is an implied warranty that the adventure insured is a lawful one, and that, so far as the insured can control the matter, the adventure shall be carried out in a lawful manner (§ 41).

(1) Rules as to the Voyage.

Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded; but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure is not so commenced the insurer may avoid the contract, unless the delay is caused by circumstances known to the insurer before the contract was concluded, or he waives the condition (§ 42).

Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach (§ 43).

Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach (§ 44).

Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is

said to be a change of voyage, and the insurer is discharged from liability as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs (§ 45).

Where a ship, without lawful excuse, *deviates* from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

There is a deviation from the voyage contemplated by the policy—

- (a) Where the course of the voyage is specifically designated by the policy, and that course is actually departed from; or
- (b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is actually departed from (§ 46).

Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but in the order designated by the policy. Where the policy is to “ports of discharge” within a given area, which are not named, the ship must proceed to them, or such of them as she goes to, in their geographical order. Failure in either case amounts to a deviation (§ 47).

In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable despatch, and if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable (§ 48).

DEVIATION or delay in prosecuting the voyage contemplated by the policy is EXCUSED—

- (a) Where authorised by any special term in the policy ;
- (b) Where caused by circumstances beyond the control of the master and his employer ;
- (c) Where reasonably necessary in order to comply with an express or implied warranty ;
- (d) Where reasonably necessary for the safety of the ship or subject-matter insured ; but when the insurance is effected on the ship alone, and not on the cargo, a deviation to save the cargo will not be excused ;
- (e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger ;
- (f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship ;
- (g) Where caused by the barratrous conduct of the master or crew, if barratry is one of the perils insured against.

When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage with reasonable despatch (§ 49).

(m) Liability of Underwriter.

The insurer is liable for any loss proximately caused by a peril insured against, but he is not liable for any loss attributable to the wilful misconduct of the insured. Unless the policy otherwise provides, however, he is liable for any loss proximately caused by a peril insured against, even though the loss would

not have happened but for the misconduct or negligence of the master or crew.

Unless the policy otherwise provides, the insurer of ship or goods is not liable for any loss proximately caused by delay, nor is he liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils (§ 55).

The Act provides rules for the ascertainment of the measure of indemnity of the underwriter; but in most cases the actual amount due from the various underwriters has to be determined, owing to the important technicalities involved, by average adjusters. The following are the most important provisions of the Act on this point.

Where there is a loss recoverable under the policy, the insurer, or each insurer if there are more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy (§ 67 (2)).

Where there is a total loss of the subject-matter insured, the measure of indemnity, subject to any express provision in the policy, is—

- (1) If the policy is a valued policy, the sum fixed by the policy.
- (2) If the policy is an unvalued policy, the insurable value of the subject-matter insured (§ 68).

Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows :—

- (1) Where the ship has been repaired, the reasonable cost of the repairs, less the customary deductions, not exceeding the sum insured in respect of any one casualty.
- (2) Where the ship has been only partially repaired, the reasonable cost of such repairs, and an indemnification for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage.
- (3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, indemnification for the reasonable depreciation arising from the unrepaired damage, not exceeding the reasonable cost of repairing such damage (§ 69).

Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the insured bears to the whole freight at the risk of the insured under the policy (§ 70).

Where there is a partial loss of goods, merchandise, or other movables, the measure of indemnity, subject to any express provision in the policy, is as follows :—

- (1) Where part of the goods, merchandise, or other movables insured by a valued policy is totally lost, such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole.

- (2) Where part of the goods, merchandise, or other movables insured by an unvalued policy is totally lost, the insurable value of the part lost.
- (3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value (§ 71).

Where the subject-matter insured is warranted free from particular average, the insured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but if the contract be apportionable, the insured may recover for a total loss of any apportionable part (§ 76 (1)).

(n) Losses.

A loss may be either total or partial. A total loss may be either an **ACTUAL TOTAL LOSS** or a **CONSTRUCTIVE TOTAL LOSS** (§ 56). A partial loss may be either a **PARTICULAR AVERAGE LOSS** or a **GENERAL AVERAGE LOSS**.

(1) *Actual Total Loss.*

Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss. In the case

of an actual total loss no notice of abandonment need be given (§ 57).

Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed (§ 58). In an ordinary case it will be presumed that the ship was lost by a peril of the sea. But when a ship started on a voyage through a war-infested area, it was held that the presumption was that she was lost through a war risk and not a peril of the sea (*Macbeth & Co. v. King* (1916), 86 L.J. K.B. 1004).

(2) *Constructive Total Loss.*

There is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred (§ 60). But where goods are insured for a particular venture, a constructive total loss occurs where the whole venture is destroyed by reason of a peril insured against, whether or not the actual goods themselves are lost (*Sanday & Co. v. British & Foreign Marine Insurance Co.* (1915), 2 K.B. 781).

Where there is a constructive total loss the insured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer, and treat the loss as if it were an actual total loss (§ 61).

If the insured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment, otherwise the loss can only be treated as a partial loss.

Notice of abandonment may be given in any manner, but must indicate the intention of the insured to abandon his insured interest in the subject-matter insured unconditionally to the insurer. It must be given with reasonable diligence after the receipt of reliable information of the loss; but where the information is of a doubtful character, the insured is entitled to a reasonable time to make enquiry.

The acceptance of an abandonment may be either express or implied from the conduct of the insurer; but the mere silence of the insurer after notice is not an acceptance.

Where notice of abandonment is accepted, the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

Notice of abandonment is unnecessary, where, at the time when the insured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him; or when it has been waived by the insurer, or in respect of a re-insurance (§ 62).

Where there is a valid abandonment, the insurer is entitled to take over the interest of the insured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto (§ 63).

(3) *Particular Average Loss.*

A PARTICULAR AVERAGE LOSS is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss (§ 64). It falls entirely upon the party interested in the subject-matter.

If a fire breaks out on board a ship and damage results to part of the cargo, both by fire and by the water used for putting the fire out, the loss by fire is a particular average loss, to be borne entirely by the party concerned; but the damage by water to other cargo is a general average loss, incurred for the safety of all parties, who must contribute even though their own goods are not damaged.

(4) *General Average Loss.*

A GENERAL AVERAGE LOSS is a loss caused by or directly consequential on a general average act. A general average act consists in—

- (i) any *extraordinary* sacrifice (it must be a *real* sacrifice), or expenditure;
- (ii) voluntarily and reasonably made or incurred;
- (iii) in time of imminent peril;
- (iv) for the purpose of *preserving* the property imperilled in the common adventure.

The peril must actually exist, and a mistaken belief that it exists, even if such belief is reasonable under the circumstances, is not enough (*Joseph Watson & Sons Ltd. v. Firemen's Fund Insurance Co. of San Francisco* (1922), 2 K.B. 355).

The danger must be common to all those who are called upon to contribute.

There is no right of contribution when the danger which gave rise to the claim was brought about by a breach of duty on the part of the person making the claim.

Where there is a general average loss, the party on whom the loss falls is entitled to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

The parties benefiting may be —

- (1) The shipowner for the value of the ship.
- (2) The owners of the cargo.
- (3) The shipowner in respect of freight payable by the charterer or under bills of lading, as the case may be.
- (4) The charterer (if any) for freight payable under bills of lading.

Subject to any express provision in the policy, where the insured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute. Where the insured has paid or is liable to pay a general average contribution in respect of the subject insured, he may recover therefor from the insurer; but the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against (§ 66).

Where a claim for general average has arisen, the amounts of contribution are usually ascertained at the port of first discharge.

The duty of having the account made up, and of collecting the contributions lies on the shipowner, and he has a lien on the cargo till all contributions are paid.

In order to avoid delay in unshipping and consequent loss, it is usual for the owners of cargo

or their underwriters to deposit a sum with the shipowners or their underwriters, or to enter into a bond to be responsible for all claims for general average on condition that the cargo is released ; such a bond is called a Lloyd's Average Bond.

EXAMPLES OF GENERAL AVERAGE are—

- (i) The cutting or casting overboard of a mast or rigging to lighten the ship during a storm. The jettison of cargo for a similar purpose. In both these cases no claim can be supported if the property jettisoned is already worthless.
- (ii) The cost of pilotage, towing, etc., incurred in putting into a port of refuge.
- (iii) The cost of unloading and reloading cargo at a port of refuge in order to allow necessary repairs to be undertaken.
- (iv) The beaching of a damaged vessel to avoid sinking.

(c) Rights of the Insurer on Payment.

(1) *Average.*

Underwriters when paying are entitled to the benefit of "average," that is to say, if the owner insures for a portion only of the value or policy valuation, he is held to be his own insurer for the balance, and if a loss takes place, the underwriters are only liable for such a proportion as the amount of the insurance bears to the true value of the subject-matter (§ 81).

(2) *Subrogation.*

Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon

becomes entitled to take over the interest of the insured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the insured in and in respect of that subject-matter as from the time of the casualty causing the loss.

Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the insured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in-so-far as the insured has been indemnified by such payment for the loss (§ 79).

(3) *Contribution.*

Where the insured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract; and if any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt (§ 80).

(p) *Assignment of Policies.*

A marine policy is assignable by indorsement, or in other customary manner, unless it contains terms expressly prohibiting assignment. It may be assigned either before or after a loss has occurred, subject to any contrary terms contained in the policy. The assignee can sue in his own name, but takes subject to equities (§ 50).

An assignment of a policy by a person subsequently to parting with or losing his interest in the subject-matter is inoperative. The policy can be assigned after a loss has occurred if the transferor has an interest (§ 51); but the underwriters are entitled to raise any defence, arising out of the contract, against even innocent *bond fide* assignees for value, which would have been available as against the original assured (*Pickersgill & Sons Ltd. v. London & Provincial Marine & General Insurance Co., Ltd.* (1912), 3 K.B. 614). It has, however, been held that under an ordinary Lloyd's policy, the interest of a mortgagee of a ship is original and not derivative, and therefore his position is not affected by the fraud or misconduct of the owner of the vessel (*P. Samuel & Co. v. Dumas* (1924), A.C. 431).

(q) Return of Premium.

Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the insured (§ 83).

Where the consideration, or an apportionable part thereof, for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the insured or his agents, the premium, or a proportionate part thereof, is thereupon returnable to the insured (§ 84 (1, 2)).

The premium, or a proportionate part of it, is also returnable—

- (1) Where the policy is void, and there has been no fraud or illegality on the part of the insured.

- (2) Where the risk has never been undertaken, except in the case of "lost or not lost" policies. In a "lost or not lost" policy the premium is returnable if the insurer knew that the vessel had arrived safely at the time when the contract was concluded.
- (3) Where the insured had no insurable interest throughout the currency of the risk, so long as the policy is not a gaming or wagering policy.
- (4) Where an unvalued policy has been over-insured.
- (5) Where a double insurance has been unknowingly effected; but if that earliest in point of time has borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no return may be claimed in respect of that policy (§ 84 (3)).

In every case, however, if the underwriter has been induced to enter into a contract by the fraud of the insured or his agent, the premium is not returnable; nor is it when the policy is a gaming or wagering policy.

§ 5.—The Marine Insurance (Gambling Policies) Act, 1909.

Under the provisions of the Marine Insurance (Gambling Policies) Act, 1909, if any person effects a contract of marine insurance without having a *bond fide* interest direct or indirect, or a *bond fide* expectation of acquiring such an interest; or if any person in the employment of the owner of a ship, not being a part-owner thereof, effects a contract of marine insurance in

relation to the ship, which contract is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term, the contract is deemed to be a contract by way of gambling, and the person effecting it is guilty of an offence for which, on summary conviction, he may be imprisoned with or without hard labour for a term not exceeding six months, or fined a sum not exceeding £100; and in either case any money received under the contract is forfeited to the Crown.

If the broker or insurer knew that the contract was actually a gambling contract, each of them is liable to the same penalties.

Proceedings may only be taken with the consent of the Attorney-General.

This Act does not render it necessary for the insured to have an insurable interest at the time when the insurance was effected, and the Marine Insurance Act, 1906, is not affected in any way by the later enactment; it is, however, essential that a person insuring against maritime perils should have at least a reasonable expectation of acquiring an interest in the subject-matter of the insurance.

§ 6.—Third Parties (Rights against Insurers) Act, 1930.

Where a person who is insured against liabilities to third parties becomes bankrupt or makes a composition or arrangement with his creditors, the rights of the assured against the insurance company in respect of any claim are transferred to and vest in the third party. (Third Parties (Rights against Insurers) Act, 1930).

The effect of this is to enable the third party to have his claim met out of the insurance money, so far as it is sufficient for the purpose, instead of having to prove in the bankruptcy or claim in the composition or arrangement. Similar rules apply when the assured, being a company, goes into liquidation (other than voluntary for the purposes of reconstruction or amalgamation), or has a receiver or manager appointed, or possession taken, by or on behalf of the holders of debentures secured by a floating charge.

SYNOPSIS OF CHAPTER VII

BAILMENTS

§ 1.—DEFINITION AND CLASSIFICATION OF BAILMENTS.**2.—GRATUITOUS BAILLEES.****3.—BAILMENTS FOR REWARD.**

(1) Hire.

(2) Where work is to be performed on the Goods.

(3) Where the Goods are Warehoused.

(4) Agisters.

4.—HIRE PURCHASE.**5.—INNKEEPERS.**

CHAPTER VII

BAILMENTS

§ 1.—Definition and Classification of Bailments.

A *bailment* is a delivery of goods by one person to another for some purpose, upon a contract, express or implied, that after the purpose has been fulfilled they shall be redelivered to the bailor, or otherwise dealt with according to his directions.

The person delivering the goods is called the *bailor*, and the person to whom they are delivered is called the *bailee*.

The divisions of bailments, based upon the principles of Roman law, are six in number :—

- (1) *Depositum*—Where goods are delivered by the bailor to the bailee, to be kept by him gratuitously, and returned on demand.
- (2) *Mandatum*—Where goods are entrusted to be carried gratuitously.
- (3) *Commodatum*—Where goods are lent for use without reward to the bailor.
- (4) *Locatio rei*—Lending out of goods for hire.
- (5) *Vadium* or *pignoris acceptum*—Where goods are pawned or pledged.
- (6) *Locatio operis faciendi*—Where goods are entrusted to have something done to them, or to be carried for hire.

It will be seen that the first two divisions comprise those bailments which are for the benefit of the bailor alone; in these cases the bailee is only liable

for *gross* negligence. The third division comprises those bailments which are for the benefit of the bailee alone; and here the bailee is liable for the *slightest* negligence. The last three divisions comprise those bailments which are for the mutual benefit of the bailor and the bailee; here each party is answerable for his own default.

Bailees are either GRATUITOUS BAILEES or BAILEES FOR REWARD. In either case the bailee is under an implied obligation to redeliver the goods bailed, but if they have perished without any negligence on the part of the bailee, he is excused from the implied promise, except in the case of carriers and innkeepers.

Again, bailments may be simple or exclusive. A *simple bailment* is one which does not confer on the bailee a right to exclude the bailor from possession, whereas in an *exclusive bailment*, the bailee has the right for the time being to retain the goods bailed in spite of the bailor's demand for possession, as in the case of goods pawned or let out for hire. The distinction is of importance in considering who may bring an action for the return of the goods if they are wrongfully taken by a third person, since such an action will only lie at the suit of a person entitled to the immediate possession of the goods. But if the bailee pawns or sells the goods without authority, the bailment will be immediately determined, and the bailor can maintain an action for the return of the goods against the third party whether the bailment be simple or exclusive.

§ 2.—Gratuitous Bailees.

The gratuitous bailee is only responsible in respect of the goods bailed for any loss which arises

from his own gross negligence; gross negligence meaning the want of that care which the bailee could be expected to take in the conduct of his own affairs.

In *Giblin v. MacMullen* ((1868), L.R. 2 P.C. 317, 336), a customer lodged his strong box with bankers who, in respect of this transaction, acted gratuitously. The customer himself kept the key of the box which contained securities, some of which were abstracted by the cashier of the bank. The bank was not liable for this theft, there being no proof of negligence on its part.

But where jewellery was deposited with the manager of a residential club, and placed in the club safe under a rule of the club which expressly repudiated any liability for safe custody, and the goods were stolen by a night porter, the proprietors were held liable notwithstanding such rule, upon the ground that they had not exercised proper care in engaging the night porter, who had been previously convicted of dishonesty (*Williams v. Curzon Syndicate, Ltd.* (1919), 35 T.L.R. 475, C.A.).

If gross negligence is alleged against the bailee, the party making the charge must himself prove it (*Bullen v. Swan Electric Engraving Co.*, 23 T.L.R. 258, C.A.).

If the bailment is not only gratuitous, but is also for the benefit of the bailee alone, he will be liable for the slightest negligence; but no bailee is responsible for reasonable wear and tear unless the contract expressly so provides.

If the subject-matter of the bailment is stolen while in the possession of the bailee, he will only be liable if want of ordinary care on his part is demonstrated.

Any conditions imposed at the time of the bailment must be complied with by the bailee. Thus, if a horse is lent to a person to ride, he is not entitled to let his servant ride it (*Bringloe v. Morrice*

(1676), 1 Mod. 210); but where a horse was for sale, and the seller bailed it to a prospective customer, in order that he might try it, it was held that the bailee could allow a competent person to ride it on his behalf (*Camoy's v. Scurr* (1840), 9 C. & P. 383).

If the situation or profession of the gratuitous bailee is such that skill on his part is implied, gross negligence will be chargeable against him if he does not use it (*Wilson v. Brett* (1843), 11 M. & W. 113).

The bailee without reward is not bound to accept the bailment, and even if he had promised to do so there is no remedy against him, owing to the absence of consideration; but when the bailment is actually effected, the trust reposed in the bailee by the bailor is sufficient consideration to support an express or implied promise on the part of the former to use proper care in dealing with the subject-matter of the bailment, or any other promise in respect thereof.

In *Hart v. Miles* ((1858), 4 C.B. N.S. 571), A. left two bills of exchange with B., who promised to get them discounted, and pay over the proceeds to the account of A.; the permission given to B. to retain the bills was accounted valuable consideration to support his promise in respect of them.

An involuntary bailee without reward, as where goods are sent unsolicited, will only incur liability for *wilful* negligence as distinct from mere carelessness (*Howard v. Harris* (1884), C. & E. 253); and if an involuntary bailee of property does something without negligence which results in the loss of the property by the owner, the bailee is not liable for conversion (*Elvin & Powell Ltd. v. Plummer Roddis, Ltd.* (1934), 50 T.L.R. 158).

§ 3.—Bailments for Reward.

Bailments for reward may be subdivided into two classes: those in respect of which the reward is to be

received by the bailor, and those in respect of which the reward is to be received by the bailee. The latter classification includes bailments made in respect of the contract of carriage, which will be found dealt with in Chapter VIII; and also bailments included in the contract of pledge, which is dealt with in Chapter X, § 4. In all cases of bailment for reward the bailee is bound to use such care as an ordinary prudent man would use.

A bailment may be for reward notwithstanding that the reward is not given by the person whose goods are bailed.

Andrews v. Home Flats Limited ((1945), 2 All E R. 698).

A baggage room was provided for the use of tenants living in a block of flats. A tenant's wife deposited in the baggage room a trunk, which was afterwards lost through the failure of the landlords to use reasonable care.

Held : The landlords were bailees for reward, since their obligation extended to articles deposited by the tenant's family, and they were accordingly liable

The following are illustrations of bailments for reward :—

(1) *Hire*.

Where goods are hired for reward, the bailee is bound to take reasonable care of them, and must comply with any conditions imposed by the bailor.

(2) *Where work is to be performed on the Goods*.

If goods are bailed in order that work may be performed upon them by the bailee for reward of any kind, he is bound to carry out the contract he has entered into, and to use ordinary care in the preservation of the property.

Thus A. left a watch with B., a watchmaker, for the purpose of having repairs done to it. B. allowed his servant to sleep in the shop where the watch was deposited, and the servant

stole it. B., who placed his own watches in greater security, was held liable to A. for the value of the watch stolen (*Clark v. Earnshaw* (1818), Gow 30).

(3) *Where the Goods are Warehoused.*

A warehouseman is responsible for any loss arising from the want of ordinary care by him.

(4) *Agisters.*

Where cattle are left for grazing with a bailee for reward, the duty of the bailee is to exercise reasonable care in respect of them ; but in the absence of special agreement there is no contract to redeliver them to the bailor. An agister has no lien, since he has not to exercise any skill upon the goods (*Jackson v. Cummings* (1839), 5 M. & W. 342).

§ 4.—Hire-Purchase.

A hire-purchase agreement is one for the bailment of goods under which the bailee may buy the goods, or under which the property in the goods will or may pass to the bailee, if certain conditions are fulfilled. Usually one person, called the owner, hires goods to another, called the hirer, on the condition that the hirer pays instalments to the owner until a certain agreed sum has been paid, when the hirer either becomes the owner of the goods automatically, or exercises an option to purchase by the payment of a small agreed sum. When a person agrees to take goods from a trader on hire-purchase, the form of transaction commonly adopted is that the trader sells the goods outright for cash to a Finance Company, who become the owners of the goods, and the Finance Company thereupon hires to the hirer, whose intention it is to acquire the goods in accordance with the terms of the

agreement, by exercising an option to purchase for the sum of one shilling when all instalments have been paid.

A hire-purchase agreement must be distinguished from a contract to purchase goods, the purchase money being paid by instalments. In the latter form of contract the purchaser has no right to return the goods, and in many cases the property passes to him when the contract is made, whereas in a hire-purchase agreement the hirer can return the goods at any time and the property does not pass to him until the option to purchase is exercised. The importance of the distinction lies in the fact that, in the case of a contract to purchase, the buyer, being in possession of the goods with the consent of the seller, can by sale, pledge or other disposition confer a good title on a third party taking in good faith, notwithstanding that the original buyer may not have completed his payments (Sale of Goods Acts, 1893, § 25 (2) ; Factors Acts, 1889, § 9) ; whereas the hirer under a contract of hire purchase, not having yet bought or agreed to buy the goods, has no such power, and should he attempt to dispose of the goods, it will not operate as more than an assignment of his rights, and the owner would be able to recover the goods from the third party unless all instalments were paid and the option to purchase exercised.

A true hire-purchase agreement is not a bill of sale, since the hirer is not the owner of the goods until his option has been exercised. A transaction of loan of money on the security of goods cannot, however, be disguised as a hire-purchase agreement so as to defeat the provisions of the Bills of Sale Acts.

Madell v. Thomas ((1891), 1 Q.B. 230).

A., wishing to borrow money on the security of chattels, assigned them absolutely to B., who thereupon hired the chattels back to A.

Held : The transaction was a bill of sale and void for want of registration.

The law of hire-purchase has been radically affected as regards small transactions by the Hire-Purchase Act, 1938, and it is therefore necessary to examine first the law on the subject apart from the Act, which still applies to agreements outside the scope of the Act, and to agreements within the Act so far as not inconsistent with its provisions, and then to examine the modifications which the Act has made in the law in relation to certain hire-purchase agreements.

Law apart from the Hire-Purchase Act, 1938. The ordinary law of contract applies, and accordingly the rights of the parties are governed by the terms of the agreement they choose to make. If it is provided that the owner may retake the goods on default in payment of any instalment, then the Courts must give effect to this agreement, even if the hirer tenders payment before action, for time is of the essence of the contract. The remaining instalments, too, may have to be paid under the terms of the agreement. If the agreement provides in addition that the hirer shall pay a sum of money to the owner as damages on default, it is a question of construction whether this sum is liquidated damages or a penalty ; if the former, the sum can be recovered, if the latter, the owner can only recover in respect of the damage which he has actually suffered.

The following rules apply in the absence of agreement to the contrary :—

(1) *Delivery.*

The owner must deliver the goods to the hirer at the address agreed upon.

(2) *Title.*

There is an implied condition that the owner shall be able to pass a good title to the goods when the option to purchase becomes exercisable.

Mercantile Union Guarantee Corporation Ltd. v. Wheatley ((1938), 1 K.B. 490).

The purported owners entered into a hire-purchase agreement in respect of a lorry, but did not actually acquire the ownership of the lorry until a few days after the agreement was signed. The hirer defaulted, and the owners took the lorry and claimed instalments and damages. The hirer denied liability and counterclaimed for return of the money he had paid, on the grounds that the owners could not pass a good title when the agreement was entered into.

Held : The owners were entitled to succeed, since they would have been able to give a good title when the option to purchase could have become exercisable.

Karflex Ltd. v. Pool ((1933), 2 K.B. 251).

The purported owners entered into a hire-purchase agreement in respect of a motor car, which unknown to them, was a stolen car. The hirer defaulted, the purported owners re-took the car, which the true owner now discovered and claimed from them.

Held . The hirer was entitled to a return of the instalments which he had paid, as the consideration had wholly failed.

(3) *Fitness.*

There is an implied warranty by the owner that the goods are and will remain as fit and suitable for the purpose for which they are required as care and skill can make them, apart from defects of which the owner was unaware and which could not have been discovered by reasonable care and skill exercised by him.

(4) *Care of goods.*

The hirer must take the same care of the goods which a reasonable and prudent man would take, and will be liable for damage caused by his negligence, though not for that attributable to fair wear and tear.

The following are the rights of third parties in relation to goods the subject of a hire-purchase agreement :—

(1) *Sureties.*

The ordinary law of suretyship applies, and in particular, the surety will be released from liability if the owner terminates the agreement by re-taking the goods, unless the agreement of suretyship otherwise provides.

(2) *Repairers.*

A person executing repairs to the goods has a lien for the cost of repairs not only against the hirer but also against the owner, and if the hirer is responsible for repairs, the lien will prevail against the owner even if the hire-purchase agreement forbids the hirer to pledge the owner's credit or create a lien.

Keene v. Thomas ((1905), 1 K.B. 136).

By a hire-purchase agreement imposing liability for repair on the hirer, the owner let a dogcart to the hirer. The hirer sent it to a coach-builder for repair.

Held : The coach-builder's lien prevailed against the owner.

There will, however, be no lien against the owner for repairs executed at the request of the hirer where the hire-purchase agreement has been previously determined.

Bowmaker Ltd. v. Wycombe Motors Ltd. ((1946), K.B. 505).

B. Ltd. let a motor car to P on hire-purchase. P. defaulted and B. Ltd. terminated the agreement. Thereafter P., being still in possession of the motor-car, delivered it to a garage, W. M. Ltd., for repair. B. Ltd., having obtained judgment against P. for the return of the motor-car, sought to recover it from W. M. Ltd., who claimed a lien for the repairs they had done.

Held : The authority of the hirer, P., had been duly determined and he was not therefore able to create a lien against the owners. The owners were entitled to recover the car from the garage without paying the repairer's bill.

(3) *Assignees.*

In the absence of agreement to the contrary, either the owner or the hirer may assign his rights under the hire-purchase agreement, except that the owner cannot assign his personal right to enter and re-take the goods. The assignee will then assume all the rights and liabilities of the assignor, though the assignor will still remain liable for the performance of his obligations.

Whiteley Ltd. v. Hill (1918), 2 K.B. 808).

A hirer of a piano, who had paid all instalments due to date, purported to sell the piano to a purchaser who believed that it was the property of the hirer. On the owners becoming aware of the sale, they sued the purchaser for its return. The purchaser paid into court all the instalments remaining unpaid.

Held: There had been a valid assignment of the hirer's rights, and the purchaser was entitled to exercise the option to purchase.

An assignee from the hirer will not get any title to the goods themselves unless and until he is able to and in fact does exercise the option to purchase, and if the agreement forbids assignment by the hirer, the supposed purchaser or assignee can obtain no rights, even if he was unaware of the terms of the agreement.

(4) *Landlords.*

A landlord has a right of distress over goods held on hire-purchase by the tenant on the premises. Statutory protection against distress is extended to many classes of goods belonging to third parties, including goods held on hire-purchase by the tenant's wife, but there is no protection for goods held on hire-purchase by the tenant himself. Even if the terms of the hire-purchase agreement provide that the agreement, and the owner's consent to the hirer's possession of the goods, shall determine if the landlord levies or threatens to levy a distress, the landlord will

still be able to distrain on the goods, as they will be in the possession, order or disposition of the tenant, by the consent and permission of the true owner, under such circumstances that the tenant is the reputed owner, and goods in such circumstances are not protected against a distress. The only remedy for the owner appears to be expressly to withdraw his consent and to demand the return of the goods prior to the levy of the distress.

(5) *Execution Creditors.*

Goods held under a hire-purchase agreement cannot be taken in execution of a judgment against the hirer.

(6) *Trustees in Bankruptcy.*

If the owner becomes bankrupt, all his rights under the agreement vest in his trustee in bankruptcy. If the hirer becomes bankrupt, his trustee becomes entitled to the benefit of the hire-purchase agreement, but if its burdens are more onerous than its benefits, he may disclaim and allow the owner to retake the goods and to prove in the hirer's bankruptcy for any damage he may have suffered. If, however, the hire-purchase goods are at the commencement of the bankruptcy in the possession, order or disposition of the hirer, by the consent and permission of the owner, in his trade or business, under such circumstances that he is the reputed owner thereof, his trustee in bankruptcy may claim them for the benefit of the general body of creditors, leaving the owner to prove in the bankruptcy for his loss. The owner's consent can be withdrawn only by express notice before the commencement of the bankruptcy. The reputed ownership of the hirer may be rebutted by showing trade custom to the contrary; in some cases, such

custom must be expressly proved ; in other cases, it is so well established that judicial notice will be taken without express proof, as in the hotel business, where it is customary for the hotel-keeper to have his furniture on hire-purchase.

Hire-Purchase Act, 1938.

The Act applies in relation to all hire-purchase agreements and credit sale agreements under which the hire-purchase price or total purchase price, as the case may be, does not exceed £100*. Credit sale agreement means an agreement for the sale of goods under which the purchase price is payable by five or more instalments: this definition is intended to prevent evasion of the provisions of the Act by making the agreement one of sale and purchase instead of one of hire-purchase.

(1) *Requirements relating to hire-purchase agreements.*

1. A cash price must be quoted before the hire-purchase agreement is entered into. This may be done by tickets attached to the goods when the hirer inspected them, by quotation in catalogues from which he selected the goods, or otherwise in writing.

2. A note or memorandum of the agreement, containing a statement of the hire-purchase price, the cash price, and the amount and date of the instalments, and a list of the goods, must be signed by the hirer and guarantor (if any), and a copy sent to the hirer within seven days of the making of the agreement. This note or memorandum must contain a notice, at least as prominent as the rest of its contents, of the right of the hirer to determine the agreement and the restriction

*The limit is £50 for motor vehicles, railway wagons or other railway rolling stock, and £500 for livestock.

of the owner's right to recover the goods, in the terms prescribed in the Schedule to the Act.

3. If the owner fails to comply with any of the foregoing requirements, he is not entitled to enforce the hire-purchase agreement or any security or guarantee, nor to recover the goods from the hirer. But if the Court is satisfied in any action that a failure to comply with any of the above requirements (other than a failure to obtain the hirer's or guarantor's signature) has not prejudiced the hirer, and that it would be just and equitable to dispense with the requirements, the Court may, subject to any conditions it thinks fit to impose, dispense with that requirement for the purpose of the action.

Similar requirements apply to a credit sale agreement under which the total purchase price exceeds £5.

(2) Right of the Hirer to determine the hire-purchase agreement.

The hirer can determine the agreement at any time before the final payment falls due by giving written notice to the owner. He must then allow the owner to re-take possession of the goods, pay all instalments due up-to-date, and a further sum if necessary to bring his total payments up to one-half* of the hire-purchase price. Further, if he has failed to take reasonable care of the goods, he will be liable to pay damages for the failure. These provisions set a limit of his liability on terminating the agreement under the Act, and cannot be made more onerous by agreement, but if the agreement itself allows him to terminate it on more favourable terms, then he may put an end to the agreement on those terms.

*The proportion is different when the hire-purchase price includes installation charges.

(3) *Restriction of the Owner's Rights to recover possession of goods.*

After one-third* of the hire-purchase price has been paid or tendered, then, provided that the hirer has not himself put an end to the agreement, the owner of the goods cannot take them back from the hirer without the hirer's consent, unless the owner obtains an Order of the Court. If the owner applies to the Court for such an Order, the Court may, without prejudice to any other power—

- (a) make an Order for the specific delivery of all the goods to the owner ; or
- (b) make an Order for the specific delivery of all the goods to the owner, and postpone the operation of the Order on condition that the hirer or any guarantor pays the unpaid balance of the hire-purchase price at such times and in such amounts as the Court, having regard to the means of the hirer and of the guarantor, thinks just, and subject to the fulfilment of such other conditions by the hirer or a guarantor as the Court thinks just. This conditional Order will not be made unless the hirer satisfies the Court that the goods are in his possession or control at the time when the order is made ; or
- (c) make an Order for the specific delivery of a part of the goods to the owner and for the transfer to the hirer of the owner's title to the remainder of the goods. This Order will not be made unless the Court is satisfied that the amount which the hirer has paid in respect of the hire-purchase price exceeds the price of that

*The proportion is different when the hire-purchase price includes installation charges.

part of the goods by at least one-third of the unpaid balance of the hire-purchase price.

When the Court has made a conditional Order as in (b) above, the terms of that Order will replace the terms of the agreement as to payment, and any other terms of the agreement which the Order may modify, and on a breach of the Order or agreement, the owner must not take any civil proceedings (other than execution for moneys unpaid under the Order) against the hirer or any guarantor otherwise than by making an application to the Court by which the Order was made. When the unpaid balance of the hire-purchase price has been paid in accordance with the terms of the Order, the owner's title to the goods will vest in the hirer. The Court may at any time vary the conditions of the Order, or revoke the postponement, or make an Order for partial delivery to the owner as above.

(4) Implied conditions and warranties.

Warranties—

- (a) that the hirer shall have and enjoy quiet possession of the goods ;
- (b) that the goods shall be free from any charge or incumbrance in favour of any third party at the time when the property is to pass.

Conditions—

- (a) that the owner shall have a right to sell the goods at the time when the property is to pass ;
- (b) that the goods shall be of merchantable quality.
To this condition there are exceptions—
 - (i) as regards goods let as second-hand goods, where the note or memorandum contains a statement to that effect ;

- (ii) as regards defects of which the owner could not reasonably have been aware at the time when the agreement was made ;
- (iii) as regards defects which an examination ought to have revealed, if the hirer had made such an examination of the goods or a sample ;
- (c) where the hirer expressly or by implication makes known the particular purpose for which the goods are required, that the goods shall be reasonably fit for such purpose.

The above warranties and conditions shall be implied notwithstanding any agreement to the contrary (and in this they differ from those implied under the Sale of Goods Act, 1893), except that condition (c) may be excluded or modified by agreement if the owner proves that before the agreement was made the provision was brought to the notice of the hirer and its effect made clear to him.

(5) *Miscellaneous Provisions of the Act.*

1. Any provision in any agreement is void whereby an owner or any person acting on his behalf is authorised to enter upon any premises for the purpose of taking possession of goods which have been let under a hire-purchase agreement, or is relieved from liability for any such entry.

2. Owners are under a duty to supply certain documents and information on written request of the hirer.

3. Where by virtue of a hire-purchase agreement a hirer is under a duty to keep the goods in his possession or control, the hirer shall inform the owner of their whereabouts on written request of the owner.

4. Where a hirer is liable to make payment to one person under two or more hire-purchase agreements, he may appropriate any payment as he thinks fit. If he does not do so, then the owner must appropriate the sum paid to the satisfaction of the sums due in the proportion which those sums bear to one another.

5. Where the return of goods to the owner has been postponed by Order of the Court, such goods will not be deemed to be in the possession of the hirer with the consent of the owner so as to take them out of protection against distress by the landlord, or so as to make them liable to seizure by the trustee in bankruptcy; nor can goods be seized by a landlord as goods comprised in a hire-purchase agreement after the owner, having a right to recover possession, has commenced an action to enforce that right. These provisions are enacted to protect the owner against the claims of the landlord and the trustee in bankruptcy when he is prevented from obtaining possession on account of the provisions of the Act.

§ 5.—Innkeepers.

An innkeeper is bound to receive into his inn all travellers who apply in a peaceable manner for admission thereto, and who are willing to pay a price commensurate with the accommodation provided, and are in a condition fit to be received as guests, so long as there is sufficient and convenient room in the inn, and no reasonable cause or excuse for refusing to serve them.

Constantine v. Imperial London Hotels Ltd. ((1944), K.B. 693).

The plaintiff, a man of colour, was refused admission to the Imperial Hotel, London, although the defendants had sufficient room to receive him; he was ready and willing to pay, and he

was a man of high character and attainments, there being no ground on which the defendants were entitled to refuse to receive and lodge him. He was in fact accommodated at another nearby hotel belonging to the defendants. He sued the defendants.

Held : The plaintiff was entitled to succeed, although no special damage was proved. A traveller is entitled to choose the hotel at which he desires to be a guest, and it was no defence to prove that there was other accommodation reasonably available.

An innkeeper is not, however, bound to provide accommodation for an unreasonably prolonged period.

He is also bound to provide meat and drink within a reasonable time upon payment therefor, unless he has a reasonable excuse. He is not bound, as a matter of law, to send out to procure food if he has none in the house, nor is he obliged to allow the whole of his provisions to be consumed during the day, but he is entitled to keep food for the evening meal or breakfast next morning if he reasonably expects other travellers to be arriving later. It is not illegal for an innkeeper to book tables for prospective guests, to serve only those who have booked tables, and to refuse to serve anyone else, even if he has food in the house, unless, having regard to all the facts, such a refusal is unreasonable (*R. v. Higgins* (1947), 2 All E.R. 619).

At common law an innkeeper is liable for loss of or damage to a traveller's goods unless occasioned by—

- (a) Act of God ;
- (b) the King's enemies ;
- (c) negligence of the traveller himself.

But an innkeeper is only bound to provide such accommodation as he possesses, so that if a car belonging to a traveller is damaged by frost owing to the garage attached to the inn being unsuitable to withstand cold weather, liability would not thereby attach to the innkeeper (*Winkworth v. Raven* (1931), 1 K.B. 652).

The innkeeper's liability commences when the traveller enters the inn as a guest, and is so received by the innkeeper; and the liability may be incurred by reason of the loss of the goods, even before any refreshment or lodging has been supplied to the guest. It does not affect the liability of the innkeeper that someone other than the traveller who may lose his goods is answerable for the cost of accommodation and refreshment to the traveller (*Wright v. Anderton* (1909), 25 T.L.R. 156).

An innkeeper is under the same liability to a visitor of his guest as to the guest himself (*Cryan v. Hotel Rembrandt* (1925), 41 T.L.R. 287).

The Innkeepers' Liability Act, 1863, enacts that no innkeeper shall be liable to his guest for loss of, or injury to goods or property brought to the inn (other than a horse or other live animal or carriage) TO A GREATER AMOUNT THAN £30, unless :

- (i) the loss has occurred through the wilful act, default, or negligence of such innkeeper, or his servant, or
- (ii) the goods in respect of which the loss has been incurred have been expressly lodged for safe custody with the innkeeper, in a sealed box if so required by him.

It will be seen from this that if the goods are lost through the wilful act, default, or negligence of the innkeeper or his servants, there is no limit to the liability of the innkeeper; but if the loss occurs otherwise, the innkeeper's liability is limited, unless the goods have actually been deposited for safe custody.

Thus in *Whitehouse v. Rickett* ((1908), 24 T.L.R. 766 H.L.), a jeweller's traveller handed his bag containing jewellery, the value of which was in excess of £30, to the hotel porter, who

knew that it contained jewellery, and who placed it in the hotel office, this being the place commonly used for the deposit of bags containing jewellery. The traveller had frequently used the hotel, and had always acted in this way. The bag was stolen, but the innkeeper was not liable in excess of £30, since the loss did not arise from the wilful act, default, or negligence of the innkeeper, and the bag had not been expressly deposited for safe custody.

To be entitled to the benefit of the Act the innkeeper is bound to exhibit a copy of the first section of the Act in a conspicuous part of the hall of the inn. The copy must be correct in substance, or the innkeeper will lose the protection the Act affords (*Spice v. Bacon* (1877), 2 Ex. D. 463, C.A.). If the copy of the section is placed on the wall of a passage leading from the hall and is fixed above a glass case 5' 8" high, it cannot be regarded as being exhibited in a conspicuous part of the hall of the inn (*Shacklock v. Elthorpe, Ltd.* (1938), 54 T.L.R. 224), although in this case the innkeeper escaped liability arising out of the theft of jewellery by reason of the negligence of the guest.

It is a common practice for hotel proprietors to post notices in the bedrooms to the effect that "all articles of value should be deposited at the office and a receipt obtained for the same." Such a notice does not operate to terminate the liability of the proprietor (in his capacity of innkeeper) in the event of loss. There is no obligation on the part of the guest to lodge his valuables for safe custody, and if goods are lost, negligence of the guest must still be proved (*Carpenter v. Haymarket Hotel, Ltd.* (1930), 170 L.T. 349). The whole matter appears to turn upon the question as to whether the guest acted reasonably in the circumstances. If a guest left valuable jewellery in an unlocked drawer in his bedroom, and the same was

stolen by an employee of the hotel, he would not be able to recover from the innkeeper (*Chamier v. De Vere Hotel* (1928), 72 S.J., 155), but if jewellery in constant use (e.g., a ring, as in *Carpenter v. Haymarket Hotel, Ltd.*) is lost, the innkeeper would generally be liable, as it could not be regarded as reasonable for the guest to go to the office of the inn on every occasion that she desired to wear the article, nor could she be regarded as negligent in retaining the goods in her room. The whole question seems to be one of degree.

The decision in *Aria v. Bridge House Hotel (Staines), Ltd.* ((1927), 163 L.T. 470), is of value in that the Court held that the limit of £30 provided for under the Act did not cover a motor car which is regarded as the modern equivalent of "horses and carriages."

An innkeeper has, at common law, a lien on all such goods of his guest as he is bound to receive at the inn, and this whether the goods belong to the guest or to some other person; thus the innkeeper's lien has been held to attach to sewing machines sent to a commercial traveller for sale, or to a piano which was hired by a guest; and even to stolen goods (*Marsh v. Commissioner of Police* (1945), K.B. 43); but if the innkeeper knows that the property does not belong to the guest, and such property is sent to the guest to be used for a particular purpose, e.g., a piano sent by the manufacturer to a professional pianist to play upon during his stay at the inn, the lien will not attach to such property (*Broadwood v. Granara* (1854), 10 Ex. 417).

A lien attaches in respect of the whole sum due from the guest to the innkeeper, and not merely for the amount due in respect of the goods detained. If the innkeeper takes security, the lien is not thereby lost.

In the exercise of the lien the innkeeper is not required to be more careful of the goods which form the subject of the lien than he is of his own goods.

If a lien attaches to furs and wearing apparel of the guest, and the innkeeper keeps them in a cupboard with goods of his own of a similar character, there is no liability for damage done by moth or rats (*Angus v. McLachlan* (1883), 23 Ch. D. 330).

Under the Innkeepers Act, 1878, in addition to the lien at common law, the innkeeper with whom goods have been left by a guest who has not paid his bill, may sell such goods by auction after they have been in his possession for six weeks without payment. Notice of the sale must be given by an advertisement in a London and local newspaper at least one month before the sale is to take place, such advertisement setting forth the description of the goods, and, if known, the name of the owner.

SYNOPSIS OF CHAPTER VIII

CARRIAGE

- § 1.—COMMON CARRIERS.
- 2.—RESPONSIBILITIES OF COMMON CARRIERS.
- 3.—DUTIES OF THE CARRIER.
- 4.—ACTION AGAINST THE CARRIER.
- 5.—THE CARRIERS ACT, 1830.
- 6.—RAILWAY COMPANIES AS CARRIERS.
- 7.—PASSENGERS' LUGGAGE.
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- 9.—CARRIAGE BY SEA. ✓
 - (a) Charter-party. ✓
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 - (c) Carriage of Goods by Sea Act, 1924.
 - (d) Freight.
 - (e) Liability of Shipowners.
 - (f) Salvage.
- 10.—CARRIAGE BY AIR.

CHAPTER VIII

CARRIAGE

The law relating to carriage is part of the law relating to bailments and falls under the category of bailments for reward.

§ 1.—Common Carriers.

A common carrier is one who, for reward, holds himself out as willing to transport from one terminus to another the goods of those who choose to employ him for the purpose.

The owner or master of a general ship is a common carrier (*Laveroni v. Drury* (1852), 8 Ex. 166, 170). So also is a barge-owner who hires out his barges for the carriage of goods to any person applying for them, where the customer has the right to fix the points of arrival and departure of the vessel (*Liver Alkali Co. v. Johnson* (1874), 9 Ex. 338 Ex. Ch.).

The Postmaster-General has been held *not* to be a common carrier.

A carrier of passengers *only* is not a common carrier (*Christie v. Griggs* (1809), 2 Camp. 79), nor is a carman doing odd jobs under special contract (*Brind v. Dale* (1837), 2 Moo. & Rob. 80). But a notice in a public conveyance limiting liability to a certain sum where a "cheap" ticket is taken will not absolve a carrier whose negligence results in

injury to his passenger from liability to pay damages to the full amount of such injury, unless he gave an option to the passenger of travelling at the full rate without restriction on his rights (*Clark v. West Ham Corporation* (1909), 2 K.B. 858).

§ 2.—Responsibilities of Common Carriers.

The common carrier is *bound* to carry goods of the class which he holds himself out as being ready to carry, of any person offering to pay the hire, unless his carriage is already full, or there is some extraordinary risk attaching to the goods. He must carry them without unnecessary delay and by his ordinary route, or such other route as may be specifically agreed upon.

The goods must be delivered to the carrier, or to some person authorised by him to receive them, otherwise the carrier will not be liable.

Thus, goods were contracted to be carried by A., under an agreement that either the owner or his servant should travel with them, and take care of them ; and this was held not to be delivery to A. as a common carrier (*Brind v. Dale, supra*).

The carrier must charge a reasonable price for his services, but is not bound under common law to charge a uniform price. He has a lien at common law on the goods for his charge for carriage, and this is good both against the consignor and the consignee ; and although by usage or the course of dealing the lien may extend in respect of a general account due to the carrier, it is as a rule only a particular lien.

AT COMMON LAW THE CARRIER IS AN INSURER OF THE GOODS in the sense that he warrants to carry and deliver the goods safely and securely. A common carrier is therefore liable, even though he has not been negligent ; but he is not liable for any loss of, or

damage to, the goods if such loss or injury arises from—

- (i) an act of God, or
- (ii) an act of the King's enemies, a term which includes rebels (*H.M. Secretary of State for War v. M.G.W. Rly. Co. of Ireland* (1923), 2 I.R. 102), or
- (iii) the negligence of the consignor, e.g., bad packing, or
- (iv) the inherent vice of the goods carried.

In order to avail himself of these exceptions the carrier must show that he was fulfilling his contract at the time when the accident happened (*Morrison & Co. Ltd. v. Shaw Savill & Albion Co. Ltd.*, (1916), 2 K.B. 783). In *Nugent v. Smith* ((1876), 1 C.P.D. 423, C.A.) it was laid down that for a loss to be attributable to an act of God it must arise from a direct, violent, sudden and irresistible act of nature WHICH COULD NOT BE FORESEEN, or if foreseen COULD NOT BE PREVENTED. If, however, the carrier has omitted to take reasonable and necessary care, or if he does not provide a proper carriage, he will be liable in any case (*Steinman v. Angier Line* (1891), 1 Q.B. 624).

A carrier will not, however, be liable where the goods are lost or damaged through neglect attributable to the owner without neglect on his own part, nor will he be liable if damage arises through inherent vice or natural deterioration of the goods themselves. And even if the defect is obvious at the time they are delivered to the carrier, as for instance, if they are not properly packed, the carrier can set this up as a defence against the claim in respect of such damage, and he will succeed if he can show that the cause of the damage was in fact the bad packing (*Gould v. S.E. & C. Rly. Co.* (1920), 2 K.B. 186).

If damage will be caused by delay, the carrier should be informed of the fact, otherwise he will not be liable if in ordinary circumstances delay would not damage the goods (*Baldwin v. London, Chatham & Dover Railway* (1882), 9 Q.B.D. 582).

A contract of carriage not being *uberrimæ fidei*, non-disclosure by the consignor of material facts (apart from the dangerous character of the goods) will not relieve the carrier of liability if he has committed a misfeasance in respect of it (*Sleat v. Fagg* (1822), 5 B. & Ald. 342). If the carrier has been negligent, only fraudulent concealment of value would be sufficient to discharge him from liability, even apart from the Carriers Act, 1830. If fraud or deceit is practised on the carrier, he will be under no liability if the goods are lost or stolen (*Walker v. Jackson* (1842), 10 M. & W. 161). But if there is no fraud, and goods are accepted unconditionally, the carrier is liable for negligence.

Thus, where A. employs B. to carry a packet from a bank, without stating, although the omission was not wilful, that such packet contained bank notes, and B. made no enquiry, B. was held liable for the loss (*Long v. District Messenger Co.* (1916), 32 T.L.R. 596).

The carrier may also, at common law, limit his liability in various ways at his discretion; e.g., as to the mode of conveyance or delivery, times for transit, the articles that he professes to carry, the price to be paid, and the time for payment. For instance, railway companies may declare themselves not to be common carriers of bicycles.

A carrier can always make a special contract with the customer, and thus limit his responsibilities, and a public notice or declaration limiting the liability of the carrier, if brought home to a customer, amounts

to a special contract. Such contracts may extend to give protection even against gross negligence or theft by the carrier's servant; in fact, to everything except wilful acts of the carrier.

Where the consignor of goods knows that they are of a dangerous character, it is his duty to give notice to the carrier of this fact.

Thus, in *Bamfield v. Goole & Sheffield Transport Co.* ((1910), 2 K.B. 94), ferro-silicon was forwarded by barge, the consignors describing it to the carrier as general cargo. The carrier did not know that the goods were dangerous, and had no means of ascertaining that fact, neither did the consignors, when they consigned them, know it. In consequence of gases given off by the substance, the carrier died, and his widow sued the consignors for damages, which she was held entitled to recover, on the ground that the defendants, when they forwarded the goods, impliedly warranted that they were safe to be carried.

§ 3.—Duties of the Carrier.

It has already been shown that the carrier is bound to carry the goods tendered to him, if he has room in his carriage, so long as the goods are of the kind that he professes to carry, unless there is some extraordinary risk. Upon completion of the transit he must deliver the goods to the consignee, as instructed by the consignor, unless he is ordered by the consignee to deliver such goods at a different address.

The consignor may change the address to which goods are to be delivered during the transit, by a notice to the carrier, and he will be responsible if he does not deliver accordingly.

Where it is customary for the consignee to send for his goods at a wharf or other place of arrival of the carrier, the carrier must keep the goods for a reasonable length of time at his own risk, until the

consignee or his assigns take delivery, and his liability as a common carrier will continue until this reasonable time has elapsed (*Bourne v. Gatliffe* (1843), 5 Scott 667).

Where the goods are refused when tendered to the consignee, the carrier ceases to be liable as a common carrier, his only liability being that of an involuntary bailee.

After the liability of the carrier, as such, has ceased, he may render himself liable as warehouseman, if he keeps the goods in his possession. Where he does this, either expressly as warehouseman or in respect of his lien for charges, he is liable to exercise reasonable care in respect of the goods, even though he may have notified the consignee that he holds them at the owners' sole risk; he is, however, entitled to all reasonable expenses incurred by him in the exercise of such reasonable care (*Great Northern Railway v. Swaffield* (1874), L.R. 9 Ex. 132).

§ 4.—Action against the Carrier.

If the goods are lost or not delivered, it will depend on the circumstances who is the proper person to take action against the carrier. As a general rule, when goods are delivered to the carrier by the seller, the property vests immediately in the buyer, and he is the person who should sue; but if the property has not passed to the buyer, the consignor may do so.

§ 5.—The Carriers Act, 1830.

Owing to the hardship of the common law upon carriers, by reason of their being bound to carry goods of any size or value, they tried to limit their liability by the publication of notices to the effect

that they would not be responsible for property above a stated value, unless at the time such property was handed to them its nature and value were declared, and an increased charge in respect thereof paid. Many points were raised for determination in respect of such notices, particularly whether parties forwarding such goods had been aware of them; and owing to this uncertainty the Carriers Act, 1830, was passed.

The Carriers Act provides that carriers are not to be liable for loss or injury, in the case of certain specified articles of more than £10 in value unless, at the time of delivery of the articles to the carrier, the nature and value of them have been declared by the person sending them, and an increased charge paid (§ 1). The party paying the increased charge is entitled to a receipt, which need not be stamped (§ 3). Such articles include--

Gold or silver coin, manufactured or unmanufactured gold or silver, jewellery, precious stones, watches and clocks, silk and furs.

In order that the carrier may obtain the protection of the Act, he must cause a legible notice of the increased charge to be posted in a conspicuous place in his office or warehouse, and such publication is deemed to be sufficient notice to the customer (§ 2).

In the event of an action in respect of the goods, the carrier is not bound by the declared value thereof, but may demand proof of the actual value.

The carrier is protected, where the value is not declared and the increased charge paid, in the case of a loss arising even from gross negligence; and he is also protected if there is a loss of or injury to goods which have been negligently taken beyond their true destination (*Morritt v. North Eastern Railway Co.*

(1876), 1 Q.B.D. 302, C.A.). But he is not protected if the loss arises by felony on the part of his servant (§ 8); and if the same is proved, it is unnecessary to show that there was negligence on the part of the carrier (*Metcalf v. London, Brighton & South Coast Railway Co.* (1858), 4 C.B. N.S. 307). Nor does the protection extend to damage caused by delay for which the carrier is responsible.

It was formerly held in several cases that the carrier was not precluded from gaining the protection of the Act in cases where he had failed to give the requisite notice, and the consignors had not declared the value of the goods; but these decisions have been doubted in the case of *Rosenthal v. L.C.C.* ((1924), 88 J.P. 157).

The Act only applies to land carriers; but where there is a complete contract to carry goods partly by land and partly by sea, the same is divisible, and if the loss takes place on land the carrier will be entitled to the protection of the Act (*Baxendale v. Great Eastern Railway Co.* (1869), L.R. 4 Q.B. 244, Ex. Ch.); but it is for the carrier to prove that the goods were lost during the land portion of the transit, in order to bring himself within the provisions of the Act (*L. & N. W. Rly. v. Ashton & Co.* (1919), 35 T.L.R. 708, H.L.).

As a result of this decision, opportunity was taken to introduce into the Railways Act, 1921, an addition to the Carriers Act (to be incorporated as § 11) to the effect that the expression "common carrier by land" shall include a common carrier by land who is also a carrier by water, and as regards every such common carrier this Act shall apply to carriage by water in the same manner as it applies

to carriage by land. Although the terms of this new section are unequivocal, § 56 of the Railways Act, 1921, under the general powers of which the amendment is effected in the Sixth Schedule, refers to this, as to other alterations, as relating only to railway companies, so that presumably common carriers, other than railway companies, are still subject to the provisions formerly existing.

If a party is entitled to recover damages in respect of a loss incurred, he may also recover the increased charges.

Except with regard to the articles to which the Act applies, the carrier cannot limit his liability by public notice (§ 4), but he may make a special contract for that purpose with the customer. Such contract can be made by the inclusion of the terms of the contract in the receipt for the goods, except in the case of railway companies and canal companies.

§ 6.—Railway Companies as Carriers.

Railway companies are under no statutory obligation to be common carriers. They may be common carriers if they choose and if they profess to act as such, but even where they have so acted, they have a right to cease to be common carriers at any time (*Smith & Sons v. L. & N. W. Rly.* (1919), 35 T.L.R. 99). But where railway companies act as common carriers, § 89 of the Railway Clauses Act, 1845, provides that their liability shall be limited in the same manner as that of other carriers, and that they shall enjoy the same protection and privileges. Except where the law has been modified by Statute, decisions applicable to ordinary carriers apply also to railway companies.

By the Railways Act, 1921 (§ 56 and Sixth Schedule) certain modifications of the provisions of the Carriers Act were made, so far as the contract related to railway companies; the limit of £10 was increased to £25, and silks, whether in a manufactured or unmanufactured state, were withdrawn from the schedule presumably on account of their lessened relative value since 1830.

Such companies are bound in law to carry passengers who offer themselves, or goods or live stock which are offered to them for carriage, but only to the extent to which they hold themselves out as common carriers. For liability of railway companies to passengers in respect of injury, see p. 407 *post*.

Railway companies frequently made special contracts with the owners of goods by embodying the terms thereof in the receipt for the goods; and it was judicially decided in many cases that such companies were thereby properly enabled to limit their liability as insurers of the goods, even in spite of gross negligence. It was held to create a good special contract even when the consignor of the goods had not signed any document, or merely where a ticket was delivered to him, or, in one case, where a verbal statement had been made to him by an official of the company (*Morville v. Great Northern Railway Co.* (1852), 21 L.J. Q.B. 319). This state of affairs created so much public dissatisfaction, that by the Railway and Canal Traffic Act, 1854, restrictions were placed upon the power of railway companies to contract out of their common law liability.

By § 7 of this Act, railway companies are prevented from contracting out of their liability as

common carriers by means of a public notice. Such notices are to be null and void. They may, however, make special contracts with persons sending animals or goods, provided such contracts are in writing, signed by the owner or person delivering the goods, and ARE REASONABLE IN THEIR TERMS. The Court or a Judge will decide what is just and reasonable (*Peck v. North Staffordshire Railway Co.* (1863), 10 H.L. Cas. 473); and it appears from the case quoted that a condition providing that the company shall not be responsible for any damage, however occasioned, is unreasonable and bad, unless an option is given to the consignor of other reasonable terms. (See also *Riggall v. Great Central Railway Co.* (1909), 25 T.L.R. 754.)

If the consignor has an offer made to carry his goods on reasonable terms, and an alternative offer to carry at a reduced rate, on condition that the company shall not be liable for the negligence of its own servant, such condition will hold good if the consignor deliberately accepts the alternative (*McCarthy v. Great Western Railway Co.*, 12 A.C. 218).

The section only applies to those cases where the neglect or default of the company has caused loss or injury; if the loss is purely accidental, any special contract will hold good, and this whether the same is reasonable or not, and even though it is not signed (*Harrison v. London, Brighton & South Coast Railway* (1862), 31 L.J. Q.B. Ex. Ch. 114, 119). And the words "neglect or default" do not include loss of the goods by reason of them being stolen by a servant of the company, and the company can therefore protect itself from liability for this by means of a

special contract, even though such contract is neither just nor reasonable.

Thus, where jewellery to the value of £250 was forwarded by rail, the value not being declared at the time of forwarding, and the goods were stolen, the goods being within the Carriers Act, the company was not liable, though it would have been if the value had been declared (*Shaw v. Great Western Railway Co.* (1894), 1 Q.B. 373).

This case applies only to a theft by a servant of the company, which was not caused or facilitated by the negligence of the company. If the goods were stolen by a stranger to the company, the difference would be that the company would only be liable if the value of the goods had been declared, and *an extra charge paid for them* under the Carriers Act.

In any special contracts under the Act the signature is only necessary where the company is itself seeking to escape liability by the terms of the contract; if the consignor himself is setting up a contract, the company is precluded from setting up a defence that the same is not signed (*Baxendale v. Great Eastern Railway* (1869), 4 Q.B. 244, Ex. Ch.).

The liability of the company for injury to animals arising from the neglect or default of the company or its servants is limited as follows :

For any horse	£100
For any neat cattle	£50 per head
For any other animal	£5 per head

unless the value is declared at the time they are forwarded, and an increased rate paid or agreed to be paid (Railways Act, 1921 (Sixth Schedule) amending the provisions of the Railway and Canal Traffic Act, 1854).

The limitation of the company's liability attaches, even though the injury is done before the animal is actually booked.

Thus in *Hodgman v. West Midland Railway Co.* ((1884), 5 B. & S. 173) a horse was taken to the station for the purpose of being forwarded, and backed upon some ironwork which had been left in the station by the neglect of the company; the horse was killed, and it was held that the owner could not obtain more compensation than £50 (the limit then in force), although the loss occurred before it was possible in the ordinary course for a declaration of value to be made.

By the Regulation of Railways Act, 1868, § 14, it is provided that in the case of through booking contracts, partly by rail and partly by sea or canal, the company can free itself from all liability for loss arising from the perils of the sea or navigation, by a notice published prominently in the booking office, and clearly and plainly printed on the freight note. This section only applies to goods, and by its means the company is able to limit its liability as insurer of the goods. (*See also* amendment of Carriers Act referred to on p. 400 *ante*.)

§ 7.—Passengers' Luggage.

Railway passengers are generally allowed to take as a matter of right a specified amount of luggage without any charge other than the passenger's own fare. This luggage is carried by the company as insurer of goods within the provisions of the Carriers Act, and § 7 of the Railway and Canal Traffic Act, 1854; the passenger must, however, if the luggage is of a value exceeding £10 (now £25), declare the same to the company, and pay the increased charge, otherwise the company is not liable (*Casswell v. Cheshire Lines Committee* (1907), 23 T.L.R. 580).

In the case of *Bunch v. Great Western Railway Co.* ((1888), 13 App. Cas. 31), where the luggage was

intended to be put into the compartment with the passenger, but was lost before this was done, but after it had been given in charge of a porter, the House of Lords held that the company were still liable as insurers, unless the loss was occasioned by the passenger's own default. The company appears to be bound to prove negligence in the passenger (or one or other of the common law exemptions from liability of a carrier), and that the loss resulted from it, in order to escape from liability as insurer (*Ehinger v. S.E. & C. Rly. Co. and Pullman Car Co., Ltd.* (1922), 38 T.L.R. 678).

The law as to the liability of the railway company where the luggage is placed in the compartment in which the passenger travels has, however, in recent years, been somewhat modified owing to the modern conditions of travel. It seems clear that the company will not be responsible for loss if the luggage remains continuously in the custody of the passenger, but if the luggage remains in the compartment whilst the passenger is in a dining car at the implied invitation of the company, the latter must be regarded as assuming responsibility for loss that may arise during the passenger's absence, unless negligence on the part of the passenger can be proved (*Johnstone v. L. & N. E. Railway Co.* (1928), reported in "The Accountant," 3rd March). Liability would not, however, attach to the company if the goods were of the class covered by the Carriers Act, 1830, and the provisions of that Act had not been complied with.

Even where luggage was handed to a porter to be placed in a first class compartment, the passenger, holding a third class ticket, travelling partly in the dining car and partly in a third class compartment,

and upon arriving at the destination, it was discovered that the luggage was missing, it was held that the railway company was liable where there was no evidence that the passenger's negligence had occasioned the loss (*Vosper v. G. W. Railway Co.* (1928), 1 K.B. 340).

In order that the passenger may recover for any loss in respect of his luggage, he must be travelling in the same train.

Thus in *Becher v. Great Eastern Railway Co.* ((1870), 5 Q.B. 241) the passenger sent his luggage forward with a servant, and followed on himself by a later train; upon the luggage being lost the company was not liable in respect of it.

The livery of a servant is his luggage, and this, although it is actually the property of the person employing him, consequently only the servant can sue if there has been an omission to deal with it with proper care, or to deliver it up when the journey is completed; but where through the negligence of a servant of the company the property of the master which was being carried as the personal luggage of the servant, was damaged through being upset in front of a train, it was held that the master could sue in tort (*Meux v. Great Eastern Railway Co.* (1895), 2 Q.B. 387).

That case appears to lay down the principle that when property is lawfully on the premises of a railway company, and is lost or damaged through the negligence of one of the company's servants, the company is liable in tort whether or not such owner is a passenger.

It is important to determine what is "personal" luggage, so that the company will be held to be insurers of it, even when carried without charge. It

must not be merchandise, but will include clothing and everything required for the personal use of the passenger. The papers of a solicitor have been held not to be passenger's luggage (*Phelps v. London & North Western Railway Co.* (1865), 19 C.B. N.S. 321).

A comedian's theatrical clothing and properties have been held not to be passenger's luggage (*Gilbey v. G.N. Rly. Co.* (1920), 36 T.L.R. 562), as also a violoncello carried by a player for his professional use (*G.W.R. Co. v. Evans* (1921), 38 T.L.R. 166).

The liability of the company extends not only to the actual transit, but also to that time when the luggage is passing to or from the vehicle which carries the passenger to or from the station, and also to the time during which it is upon the platform. If the luggage is in the charge of the owner or of his agent, the liability of the company ceases; and if it is delivered by a passenger to a porter, it will be a question of fact as to whether such porter was an agent of the company or the agent of the passenger. If a passenger arrives too early for his train, and hands his luggage to a porter who undertakes to label it for its destination, the luggage is in the custody of the company as common carriers, and it cannot protect itself by a notice disclaiming liability (*Lovel v. London, Chatham & Dover Railway Co.* (1876), 45 L.J. Q.B. 476); but where the passenger leaves the luggage in charge of a porter, without directions, and goes off on his own business or pleasure, it has been held that the porter is the agent of the passenger, and the company is not liable (*Agrell v. London & North Western Railway Co.* (1876), 34 L.T. 134; *Welch v. London & North Western Railway Co.* (1885), 34 W.R. 166).

Railway companies are not bound to warehouse luggage, and in consequence § 7 of the Railway and Canal Traffic Act, 1854, does not apply to luggage in the cloak-room. Any conditions which the company purports to impose upon passengers placing luggage in a cloak-room must be brought to the passenger's notice, otherwise he is not bound by them. In *Van Toll v. South Eastern Railway Co.* ((1862), 31 L.J. C.P. 241), it was held that if a passenger takes a cloak-room ticket for luggage deposited, and does not trouble to read it, he thereby assents to the conditions imposed; and it is immaterial that such conditions (not amounting to fraud) are unreasonable (*Giband v. Great Eastern Railway Company* (1920), 36 T.L.R. 884, D.).

The railway company has a lien upon the passenger's luggage for an unpaid fare, but it has no right to sell. A company has also been held to have a lien against the owners of a sewing machine, which had been deposited with it by the person who had hired it under a hire-purchase agreement, for the payment of the cloak-room charges (*Singer Sewing Machine Co. v. London & South Western Railway Co.* (1894), 1 Q.B. 383).

§ 8.—Carriage of Passengers.

Railway companies are not insurers of passengers, their liability arising only from negligence; and it is therefore necessary for a passenger seeking to recover for injury to prove negligence on the part of the company. Even if he proves negligence, the company will not be liable if there has been contributory negligence on his own part.

Railway companies are not bound to issue time tables, though it is the custom to do so. When a time table is issued, it amounts to a contract with the public by the publishing company that its own trains and the trains of other companies will run as stated therein (*Denton v. Great Northern Railway* (1856), 5 E. & B. 860). If the time table contains a promise "to pay every attention to ensure punctuality," this overrides a term negating responsibility for any delay; but if such promise is broken, the company is not answerable to the extent of the cost of a special train engaged by the passenger (*Le Blanche v. London & North Western Railway Co.* (1876), 1 C.P.D. 286, C.A.). Hotel expenses would, however, in ordinary cases be recoverable, so long as the fact that they had to be incurred was the result of the negligent delay of the company.

In contracts involving the carrying of passengers by land and water there is not, in the absence of any special agreement, a contract to carry at any particular time.

In *Crane v. Tyne Shipping Co.* ((1897), 13 T.L.R. 172), the plaintiff had a return ticket by boat from London to Newcastle; he was desirous of returning on a particular day, but was prevented from doing so owing to the boat breaking down, and as a consequence he took the train to London. He was unable to recover by action the expenses incurred by him.

§ 9.—Carriage by Sea.

It has already been shown that the Carriers Act, 1830, enables common carriers to limit their liabilities, under certain circumstances, so far as carriage by land is concerned; but in carriage by sea the carrier is liable for all loss or damage, however caused, except where his liability is limited by special

contract ; or is restricted by the Merchant Shipping Act, 1894. (*See* p. 427 *post.*) Also, being a common carrier, the carrier can always avail himself of the exceptions, act of God, King's enemies, and inherent vice.

This special contract is known as the contract of affreightment, and takes the form either of a charter-party or of a bill of lading.

(a) Charter-party.

A *charter-party* is used where a merchant hires the ship, or part of it, for the carriage of goods on a particular voyage, or during a particular period, for a sum of money called freight. By the terms of the charter-party the charterer, as a rule, only contracts for the use of the ship ; possession remains with the owner, and navigation is carried on by his servants. But sometimes in a time-charter there is an absolute letting of the whole ship, which then leaves the possession of the owner and comes under the absolute control of the charterer, and is navigated by his servants.

The usual terms of a charter-party consist of an undertaking by the shipowners that the ship, being seaworthy and furnished with necessaries, shall be ready by a certain day to receive the cargo, shall sail when loaded, and deliver the cargo at the port of destination ; a clause being, usually, also inserted exonerating the shipowner from any liability in respect of loss which may arise by the Act of God, the King's enemies, arrest and restraint of princes, rulers and people, fire, barratry of the master or crew, gales, stranding, and other dangers of navigation. The charterer, on his part, undertakes

to load and unload the ship within a specified number of days, called lay or running days, and if he delays the ship longer, to pay demurrage; and he also undertakes to pay freight as agreed.

In every charter-party the following undertakings on the part of the shipowner are implied by law:—

- (a) That the owner undertakes to make the ship seaworthy.
- (b) That the ship shall be ready to commence the voyage and load the cargo and proceed on the voyage with reasonable dispatch.

If the delay is such as goes to the root of the contract, and thereby the charterer loses all benefit under the contract, he may refuse to perform his part of the contract altogether (*Freeman v. Taylor* (1831), 8 Bing. 124). If the delay is not so grave as to have the above result, the charterer merely has a right of action for damages against the shipowner. But if the delay is caused by supervening circumstances over which the shipowner has no control, and is such that the whole commercial object of the venture is frustrated, the rights and obligations of both parties to the contract are destroyed. (*See* Chapter I, § 11 (d).)

- (c) That the ship shall not deviate except for good cause or as provided for in the contract.

The circumstances under which deviation is excusable are substantially the same as those under which a deviation is permitted in a contract of Marine Insurance. (*See* p. 351 *ante*).

It has, however, been decided that where there is an obligation under the charter to load a full

cargo, and this is not done, the shipowner is justified in deviating for the purpose of taking other cargo to fill up, if such deviation is a reasonable step to take in mitigation of the damages to which the shipowner would be entitled, as the result of the failure on the part of the charterer to load a full and complete cargo (*Wallems, Redevi & Aktieselskab v. W. H. Muller & Co., Batavia* (1927), 2 K.B. 99). In general, deviation is only permissible in the circumstances already considered and not where it operates merely for the pecuniary benefit or advantage of the shipowner.

Thus in *Foscolo Mango & Co., Ltd. v. Staggy Lane Ltd.* ((1931), 2 K.B. 48) where workmen were on board a ship proceeding from Swansea to Constantinople, for the purpose of watching the operation of certain machinery recently installed, and these workmen were landed at St. Ives, at which the vessel would not normally have called, the deviation was considered unreasonable, and the shipowners were liable for loss which the cargo sustained in the course of the voyage.

All these undertakings are conditions precedent to the contract, and the breach of any of them disentitles the shipowner to rely on any of the exceptions contained in the charter-party. His position then becomes that of an ordinary common carrier, and in order to escape liability for loss or damage to the goods, he must show that such loss or damage was caused by the Act of God, King's enemies, or inherent vice of the goods, *and* that it was bound to have occurred even if the undertaking complained of had not been broken.

In the case of a deviation, it is important to notice that to escape liability the same onus is on the shipowner, whether the loss or damage occurred before, during, or after the deviation (*Joseph Thorley v. Orchis S. S. Co.* (1907), 1 K.B. 660).

The following is a form of charter-party :—

CHARTER-PARTY.

LONDON,

19

IT IS THIS DAY MUTUALLY AGREED BETWEEN

of the good Ship or Vessel called the

of the measurement of
now
and

Tons, or thereabouts,
Merchants,

That the said Ship, being tight, staunch and strong, and every way fitted for the Voyage, shall with all convenient speed, sail and proceed to

or so near thereunto as she may safely get, and there load from the Factors of the said Affreighters a full and complete Cargo of

to be brought to, and taken from alongside, free of risk and expense to the Ship, not exceeding what she can reasonably stow and carry over and above her Tackle, Apparel, Provisions and Furniture, and being so loaded, shall therewith proceed to

or so near thereunto as she may safely get, and there deliver the same on being paid freight as follows :—

in full of all Port Charges and Pilotage. (The Act of God, the King's Enemies, Restraint of Princes and Rulers, Fire and all and every other Dangers and Accidents of the Seas, Rivers, and Navigation, of whatever nature and kind soever during the said voyage always excepted.) The Captain to have an absolute lien on the cargo for all freight, dead freight and demurrage. The Freight to be paid on unloading and right delivery of the Cargo.

The necessary cash for ship's ordinary disbursements to be advanced by Shippers at port of loading on usual terms days to be allowed the said Merchants (if the Ship is not sooner despatched) for loading and discharging.

The Ship to address to Charterers' Agents at port of discharge, paying commission.

And days at days on Demurrage over and above the said laying Pounds per day.

Penalty for non-performance of this Agreement, estimated amount of Freight.

The Brokerage at per cent., by the Ship, on the amount of Freight, Primage, and Demurrage, is due on signment of this Charter-party and payable to

The Vessel to be reported at Custom House in the port of

Witness to the Signature of

Witness to the Signature of

(NOTE.—A charter-party requires a 6d. stamp affixed at the time of, or prior to, execution.)

It is important to note that the situation of the ship at the time of the contract being entered into is a condition which, if not satisfied, will enable the charterer to rescind the contract; its seaworthiness and the fact that it is in every way fitted for the voyage is a condition at the commencement of the voyage, but there is no implied condition or warranty that it will so continue during the whole of the voyage, though, if the voyage is divided into several distinct parts, the ship must be seaworthy at the commencement of each part (*The Vortigern* (1899), 4 Comm. Cas. 152). It is the owner's duty to bring the ship to the port agreed upon from which the voyage is to start, and the charterer's duty, upon notification, to bring his goods to such port, and deliver them to the servants of the shipowner alongside the ship (*Grant v. Coverdale*, 9 App. Cas. 475). The words "as near thereunto as she can safely get," enable the shipowner to call upon the consignee to take delivery, if for some cause the ship cannot actually get to the port of delivery within a reasonable time (*Nelson v. Dahl* (1879), 12 Ch. D. 592); the shipowner must bring the ship to the port of delivery with despatch, and be ready as soon as reasonably possible to discharge the cargo in the usual manner (*Nelson v. Dahl*, *supra*).

If the owner of the goods imported from foreign parts into the United Kingdom fails to take delivery thereof, in accordance with the terms of the charter-party, or after the expiration of 72 hours, exclusive of Sunday or a holiday, from the time of report of the ship, the shipowner may land the goods and place them in a warehouse or wharf named in the charter-party, or one convenient for the purpose, and may, by giving notice in writing to the warehouseman, leave them in

the custody of the wharfinger or warehouseman, subject to the shipowner's lien for freight and charges (Merchant Shipping Act, 1894, §§ 493, 494).

Demurrage is a sum fixed by the parties by way of liquidated damages, which the charterers become liable to pay if they detain the ship by failure to load or unload within the specified lay days.

Lay days are usually either "Working days," "Running days" or "Weather working days."

"Working days" are those on which work is usually done at the port, i.e., every day excluding Sundays and holidays, no regard being had to bad weather.

"Running days" mean every day, Sundays and holidays included.

"Weather working days" are those on which work is not stopped through bad weather.

When the charter-party specifies that the ship is to be taken to certain docks or wharves for the purpose of loading or discharging, the lay days commence from the time when she arrives at such docks or wharves.

But when no such dock or wharf is mentioned, the lay days commence to run from the time when the ship arrives in such a part of the port as is customary for ships to lie at, either while loading or unloading, or waiting for a berth.

As soon as the lay days have commenced to run, the charterer is under an absolute obligation to complete the loading or unloading within the time named, and unless he does so complete it he will be bound to pay demurrage at the agreed rate, unless the delay is caused by the fault of the shipowner or by some executive act of the lawful port authorities.

Where the charter-party simply provides for demurrage at a certain rate, but does not name any particular number of days as lay days, demurrage will be payable after a reasonable time for loading or unloading has elapsed, having due regard to the existing circumstances at the port at that time (*Hick v. Rodocanachi* (1893), A.C. 22).

In such a case, therefore, if loading or unloading was delayed by reason of a strike of stevedores, that fact would be taken into consideration in determining what was a reasonable time; whereas, if lay days had been provided for in the charter-party, a strike would *not* have relieved the charterer from completing the operation within the specified time.

The clause of the charter-party which provides that the charterer's liability, under the charter-party, shall cease on the cargo being loaded, is known as the "cesser clause"; by this clause the charterer's liability is put an end to, and the shipowner acquires a lien upon the goods for the freight and demurrage due to him. But where the lien given does not cover the whole amount due to the shipowner by way of freight or demurrage, the cesser clause only relieves the charterer to the extent that the shipowner has a lien (*Hansen v. Harrold* (1894), 1 Q.B. 612).

And where by the charter-party it is agreed that bills of lading shall be given in a certain form, even if such bills are given, the cesser clause will not protect the charterer if no lien is given by the bill of lading (*Jennesen v. Secretary of State for India* (1916), 2 K.B. 702).

Where a vessel has been chartered, and the charterers use the ship as a general ship, the master of the ship may be the agent of the owners or of the

charterer. If the charter-party puts the ship entirely out of the control of the owner during the term agreed upon in the charter-party, the master is generally the agent of the charterer (*Baumwoll v. Furness* (1893), A.C. 14), but this only happens when the charter is a demise of the ship, and in any cases of ambiguity the tendency of the Courts has usually been against treating a charter as a demise (*Herne Bay Co. v. Hutton* (1903), 2 K.B. 689); and the fact that the charter-party itself provides that the master shall be the agent of the charterer will not be binding on third parties, who have no notice of the fact, and the master in signing bills of lading in such a case will render the shipowners themselves liable (*Sandeman v. Scurr* (1867), L.R. 2 Q.B. 86, 97).

The fact that a clause in the bill of lading says "all conditions as per charter," will not give the shipper constructive notice of such provisions (*Manchester Trust v. Furness Withy & Co.* (1895), 2 Q.B. 539).

(b) Bill of Lading.

Where cargo is sent in a general ship, the contract of affreightment is generally embodied in a bill of lading which operates as—

- (1) A receipt for the goods shipped.
- (2) A document of title, enabling the consignee to obtain delivery of the goods, and
- (3) Evidence of the contract of affreightment.

It does not strictly constitute the contract itself, since such contract was made prior to the bill of lading having been signed (*Sewell v. Burdick* (1884), 10 A.C. 105).

By the Bills of Lading Act, 1855, it is provided that "Every consignee of goods named in a bill of

lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities, in respect of such goods, as if the contract contained in the bill of lading had been made with himself" (§ 1).

This does not mean that every consignment or indorsement will transfer the property to the consignee or indorsee. In order to ascertain whether or not the property passes, the intention of the parties must be considered, as in the case of an ordinary sale of goods.

Under § 2 there is a right of stoppage *in transitu* and a lien for freight. It must, however, be remembered that where a consignee of goods is in possession of the bill of lading, *with the consent of the true owner*, the transfer by him of the bill of lading by way of sale to a *bonâ fide* purchaser who takes without notice of defect in the title of his transferor, defeats the consignor's rights of lien or stoppage *in transitu*; but if the transfer is merely by way of pledge, the consignor has a right to reclaim the goods, subject to paying out the amount of the advance (Sale of Goods Act, 1893, § 47).

By § 3 of the Bills of Lading Act, 1855, the bill is made conclusive evidence as against the master or other person signing it, unless the holder has had actual notice that the goods had not been put on board; but the party signing may show that the misrepresentation was caused without default on his part, and wholly caused by fraud of the shipper, the holder, or some person under whom the holder claims. But the master, by signing, does not bind

the owner to deliver the amount specified ; nor is the owner estopped by the signature of the master from showing that the goods were not put on board ; only the party signing is bound. The onus is then on the owner to show that in fact the goods were not shipped, and in practice this is usually extremely difficult to do without the evidence of the master, which, of course, for this purpose is inadmissible.

Where a " clean " bill of lading is given, i.e., where there is a declaration that the goods are shipped " in good order and condition," the master and his owner are bound thereby since there is an admission that the goods or packages were externally in good condition at the time of shipment. The master is not under obligation to open packages to ascertain or verify quantity, condition, etc. The shipowner would therefore only be responsible for defects which could have been apparent on reasonable examination, and should the goods be found to be damaged upon unloading, the onus is on the shipowner to show that such damage was due to some other cause such as might arise from an excepted risk.

The shipowners are not liable for goods which have never been received on the ship, and this, even though the master has signed the bill of lading, since the master has no authority to sign bills of lading unless the goods have been received on board (*Maclean v. Fleming* (1872), 2 H.L. Sc. 128) ; but the shipowners themselves must prove that the goods were never upon the ship (*Smith v. Bedouin Steam Navigation Co.* (1896), A.C. 70) ; and positive proof that the goods were not shipped is necessary. It is not enough that they may have been put on board.

It is general, where shipping from lighters, for an

acknowledgment of goods shipped to be first given on what is known as the "mate's receipt," which is afterwards handed back in exchange for the actual bill of lading signed by the master of the ship; in such a case the master is not bound to retain the bill of lading, pending production of the mate's receipt, if the goods have been loaded, so long as he is not aware of any interests in the goods other than those of the person shipping them (*Hathesing v. Lane* (1874), 17 Eq. 92). The shipowner is, however, entitled to pass the bill of lading to a person in possession of the mate's receipt, if he is not aware of any other claim (*Eman v. Nichol* (1842), 3 M. & G. 614); but if the mate's receipt is in the hands of one party, and the bill of lading is in the hands of another party, the property must be handed over to the person in possession of the bill of lading (*Baumwoll v. Furness* (1893), A.C. 8.)

A mate's receipt is only evidence that the goods have been put on board and that the goods belong to the party named therein; and the mere transference or indorsement of a mate's receipt does not pass the property in the goods, unless the shipowner or his agent has notice that the property has been so dealt with.

The following is the form of a bill of lading:—

SHIPPED in good Order and well-conditioned by
in and upon the good Steam Ship called the
whereof is Master for this present Voyage
and now riding at anchor in
and bound for

being marked and numbered as in the margin and are to be delivered in the like good Order and well-conditioned at the aforesaid Port of

(The Act of God, the King's Enemies, Fire, Machinery, Boilers, Steam, and all and every other Dangers and Accidents of the Seas, Rivers and

Steam Navigation of whatever nature and kind soever excepted) unto
 or to
 Assigns Freight for the said Goods

with primage and average accustomed. IN WITNESS whereof the Master
 or Purser of the said Ship hath affirmed to Bills of
 Lading, all of this tenor and date, the one of which Bills
 being accomplished the other to stand void.

Dated in London, 19 ;

Weight and contents unknown.

(NOTE.—A bill of lading requires a 6d. stamp affixed at the time of,
 or prior to, execution.)

It will be observed that the contract exempts the shipowner from liability in respect of loss by the Act of God, the King's enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind; apart from these, the shipowner is bound to carry the goods with safety. (Note, however, the excepted risks specified in the Carriage of Goods by Sea Act, 1924, p. 423 *post*.)

A bill of lading is not a negotiable instrument in the strict sense in which that term is used of a cheque. The real test as to whether or not a document is negotiable is whether the transferee can get a better title under the document than the transferor had. It is true that there are cases where, as against the true owner, the transferee of a bill of lading gets a better title than his transferor; but these cases arise not by virtue of the instrument itself, but by reason of § 9 of the Factors Act, 1889, and § 25 of the Sale of Goods Act, 1893, because having bought or agreed to buy the goods, the transferee is in possession of the bill of lading with the consent of the true owner (*Cahn v. Pockett's Bristol Channel Steam Packet Co.* (1899), 1 Q.B. 643).

There is an anomalous case, when the indorsee of a bill of lading would appear to get a better title

than his indorser, namely, when the unpaid vendor's right of lien or stoppage *in transitu*, which is good against the indorser is of no avail against an innocent indorsee for value (*Fuentes v. Monti* (1868), 3 C.P. 276).

Where bills of lading are drawn in a set, and different parts handed to different persons, the first transferee for value is entitled to the goods (*Barber v. Meyerstein* (1870), 4 H.L. 317); but if the master acting *bonâ fide* delivers goods to the first person presenting one of the bills forming the set, he will not be liable if it should subsequently transpire that such person was not the first transferee (*Glyn Mills & Co. v. East and West India Dock Co.* (1862), 7 A.C. 591). But the mere fact that a transferee has obtained possession of the goods in this way will not give him any better right as against another claimant than he originally had. If, however, the master knows of conflicting claims, the course for him to take is to refuse to deliver the goods to either party, and to interplead, i.e., to apply to the Court for relief from adverse claims.

(c) Carriage of Goods by Sea Act, 1924.

This Act has been passed as a result of International Conferences on Maritime Law held at Brussels in October, 1922, and October, 1923, with the object of giving statutory force, so far as this country is concerned, to the convention for the unification of certain rules relating to bills of lading.

The rules contained in the Schedule to the Act apply to the carriage of goods from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland, operating as from 1st January, 1925.

An absolute undertaking by the carrier to provide a seaworthy ship, is not implied in any contract for the carriage of goods by sea to which the rules apply, but the carrier is under the following obligations before and at the beginning of the voyage :—

- (1) To make the ship seaworthy.
- (2) To properly man, equip and supply the ship.
- (3) Make the holds, etc., fit and safe for the reception, carriage and preservation of the goods.
- (4) To properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Upon receipt of the goods into his charge, the carrier or the master or the agent of the carrier, shall, on demand of the shipper, issue to the latter a bill of lading showing among other things :—

- (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such manner as should ordinarily remain legible until the end of the voyage ;
- (b) Either the number of packages or pieces or the quantity, or weight, as the case may be, as furnished in writing by the shipper ;
- (c) The apparent order and condition of the goods.

The carrier is not bound to include particulars of marks, number, quantity or weight if he has reasonable grounds for suspecting that the information

supplied to him does not accurately represent the goods actually received or which he has had no means of checking.

Upon the actual loading of the goods, there must be issued to the shipper, if he so demands, a "shipped" bill of lading which will contain, *inter alia*, the name of the ship, the date of shipment and a statement that the goods have been put on board.

Notice of loss or damage must be given to the carrier or his agent before or at the time of the removal of the goods into the custody of the consignee, or if the damage is not apparent, then within three days. Any action to recover damage must be brought within one year after delivery, or the date delivery should have taken place.

Neither the carrier nor the ship shall be liable for loss or damage arising from unseaworthiness, unless caused by want of due diligence on the part of the carrier. The burden of proof of diligence is on the carrier.

Neither the carrier nor the ship shall be responsible for loss or damage resulting from—

- (1) Act, neglect or default of the master, mariner, pilot or the servant of the carrier in the navigation or in the management of the ship.
- (2) Fire, unless caused by the actual fault or privity of the carrier.
- (3) Perils, dangers or accidents of the sea or other navigable waters.
- (4) Act of God.
- (5) Act of war.
- (6) Act of public enemies.

- (7) Arrest or restraint of princes, rulers or people, or seizure under legal process.
- (8) Quarantine restrictions.
- (9) Act or omission of the shipper or owner of the goods, his agent or representative.
- (10) Strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general.
- (11) Riots and civil commotions.
- (12) Saving or attempting to save life or property at sea.
- (13) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
- (14) Insufficiency of packing.
- (15) Insufficiency or inadequacy of marks.
- (16) Latent defects, not discoverable by due diligence.
- (17) Any other cause arising without the actual fault or privity of the carrier or the fault or neglect of his agents or servants.

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement of the rules or of the contract of carriage, and the carrier shall not be liable for loss or damage resulting therefrom.

The limit of liability in any case of loss is £100 per package or unit or the equivalent in other currency, unless the value has been declared and inserted in the bill of lading.

Provision is made for dealing with goods of an explosive or dangerous character.

The rules under the Act are not applicable to charter-parties.

There are saving clauses to permit the carrier in certain circumstances to make special contracts in the bill of lading restricting or enlarging his responsibilities and obligations, but the circumstances must be special, and such clauses are not to apply to ordinary commercial shipments where there is not justification for departure from the rules above referred to.

It will be noted that the list of "excepted risks" is considerably enlarged, and that the warranty of seaworthiness that formerly existed is abrogated in favour of an obligation by the shipowner to make the ship seaworthy. The distinction appears to be that where there is a warranty of seaworthiness, the carrier in any event would be liable for loss which arose from unseaworthiness; whereas such liability does not attach to him where he is merely required to exercise due care to see that the ship is seaworthy. A further result would be that as there is only an obligation to make the ship seaworthy at the commencement of the voyage, if the voyage is in stages, the intermediate warranties would no longer apply.

(d) Freight.

A shipowner, where he carries by charter-party or by bill of lading, is entitled to a reward for his services, and this will take the form of freight, as specified in the contract. Generally, freight is not payable until the contract has been completed and the goods delivered, but it is sometimes a term of the contract that the freight shall be paid before the completion of the voyage; in such a case failure of the contract by non-completion does not give

rise to the return of such freight or any part thereof, unless the non-compliance is due to a loss of the ship or cargo by a peril not excepted in the charter-party or bill of lading, or unless the shipowner has failed to provide a seaworthy ship within a reasonable time.

Advance freight is freight due at the time of starting. If it has not been paid, it can be recovered by the shipowner, even though the ship is lost, provided that the ship was lost through an excepted peril (*Byrne v. Schiller* (1871), 6 Ex. 319). It is, however, only payable when goods have actually been carried; therefore if goods are destroyed before the commencement of the voyage, no freight could have been earned by the ship in respect of such goods, and advance freight is not recoverable thereon.

Lump sum freight is the amount agreed to be paid by a charterer irrespective of the quantity of goods actually shipped, and whether or no he loads a full cargo.

Dead freight must be carefully distinguished from the last-named. Where the charterer fails to load a full and complete cargo, and a lump sum is not payable, the shipowner may suffer loss in not being able to secure the shipment of other goods for the safety of the vessel. Such loss would be recoverable from the charterer by way of damages as dead freight.

There is no lien at common law for dead freight, but frequently such a lien is given by express contract between the parties.

If the cargo owner does not take delivery within a reasonable time after the ship's arrival at the port of discharge, or send instructions as to the disposal of the cargo, the master has power to deal with the

goods in the interest of the cargo owner at the latter's expense. He can either land the goods or convey them to some other port convenient to the cargo owner. If he so conveys them, he is entitled to charge for carriage to such port, and such a charge is called "back freight."

Where the contract has not been completed, and goods have been delivered at a port short of the destination in such a manner as to show an acceptance of a new contract in place of the old, *e.g.*, a voluntary acceptance of the goods at another port, there is an implied obligation to pay a proportionate freight for that part of the voyage which has been accomplished ; this is known as "*freight pro rata*." If a new agreement of this nature cannot be inferred, there is no obligation on the part of the shipper to pay *pro rata* freight. *Pro rata* freight is also payable when the shipowner has contracted to carry a full cargo, but in fact only carries part of it.

A shipowner has a lien for freight and charges due to him upon the goods which he carries. As shown above, the lien may extend to goods which are warehoused, so long as notice is given at the time the goods are so dealt with. The lien for freight or for general average contributions is a possessory lien, but that for expenses incurred in protecting the goods is a maritime lien.

(e) Liability of Shipowners.

By § 502 of the Merchant Shipping Act, 1894, it is enacted that the owner shall not be liable to make good any loss or damage happening, without his actual fault or privity, where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board

the ship. This protection is absolute and applies even if the ship was unseaworthy, so long as the unseaworthiness was not the cause of the fire.

Damage caused by smoke or by water used in putting out a fire has been held to be damage caused by fire within the meaning of the Statute (*The "Diamond"* (1906), P. 282). But the shipowner is not exempted by this section from paying general average contribution in respect of damage caused to other goods by water used for extinguishing a fire (*Greenshields, Cowie & Co. v. Stephens* (1908), A.C. 431).

Another part of the same section exempts the owner from liability "where any gold, silver, diamonds, watches, jewels or precious stones taken in or put on board the ship are lost or damaged by reason of any robbery, embezzlement, making away with or secreting thereof, the true nature and value of which have not at the time of shipment been declared to the owner or master of the ship in the bills of lading or otherwise by writing."

Section 503 of the same Act limits the liability of the owners of a ship, British or foreign, for loss of life or personal injury, and damage to or loss of goods, if the occurrence takes place *without their actual fault or privity*, to an aggregate amount not exceeding £15 for each ton of their ship's tonnage; or for damage to or loss of goods to an aggregate amount not exceeding £8 for each ton of their ship's tonnage. The owner of an *unregistered* British ship is not entitled to this protection. The limit applies also to loss of life or personal injury of persons in another vessel, and to loss or damage to another vessel or goods thereon, if caused by improper navigation of the ship.

Where there is a loss both of life and goods, the claims in respect of the former are to be satisfied first out of the amount representing £7 per ton of the ship's tonnage, and the balance of the liability to rank equally with that in respect of the goods out of the amount representing £8 per ton of the ship's tonnage.

The limitation of liability afforded by the above-named section shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the ship. Such limitation shall relate to the whole of any losses and damages, which may arise upon any one distinct occasion, although such losses and damages may be sustained by more than one person (Merchant Shipping (Liability of Shipowners and Others) Act, 1900, §§ 1, 3).

Section 504 directs that the owners may apply to the High Court to determine the amount of their liability, and to apportion the total amount among the various claimants.

The owner of goods may himself be liable to contribute to a loss incurred for the general safety, or he may become personally liable for a loss in respect of any goods in a case where the shipowner has contracted out of his general liability. These liabilities come under the head of general and particular average, and will be found dealt with fully in Chapter VI, § 4 (n).

(f) *Salvage*.

Salvage is the reward given to those who save a vessel, apparel and cargo, or that which had formed

part of them, from shipwreck. (The term is sometimes used to describe the property salvaged.) The right to payment for salvage may arise, but does not necessarily do so, out of express contract (*Five Steel Barges* (1890), 15 P.D. 142). The amount due to the salvor is generally assessed by the Court, though there is nothing to prevent the amount being actually fixed by contract before the work of salvage is commenced; such an agreement, however, is not binding upon the owner and crew of the vessel which is performing the salvage operations, unless it is fair and honest (*The Nasmyth* (1885), 10 P.D. 41), and it will be set aside if it is inequitable (*The Medina* (1877), P.D. 5). The owners of a ship responsible for a collision are not entitled to any award for the performance of salvage services, but if another vessel in the same ownership as the ship responsible renders such services, salvage remuneration can be claimed (*The Kafiristan* (1937), 3 A.E.R. 747—H.L.).

To recover salvage, where not undertaken under special contract, it is necessary for the salvor to show—

- (a) That he rendered voluntary service;
- (b) That such services involved skill and danger, and that enterprise was shown in the performance thereof;
- (c) That benefit resulted from such services;
- (d) That the vessel saved was in a position of danger.

Normally, a person under a duty to perform services is not entitled to a reward for salvage. Thus, a master who successfully brings his ship to port during a storm could not claim salvage, as he merely performed the duties for which he was engaged.

There is always a presumption when salvage services are rendered voluntarily that nothing will be paid unless some property is saved as a result of the operations of the salvors. This presumption normally applies also when the salvage operations are performed under contract.

A seaman cannot agree to forego any right that he may have in the nature of salvage, except in the case of seamen on a ship which is actually employed in salvage service (Merchant Shipping Act, 1894, § 156).

§ 10.—Carriage by Air.

Carriage by air is the most recent method of transporting goods and, until 1932, had not been the subject of legislative attention. It had seemed clear that persons holding themselves out as being willing to carry goods by means of aircraft would be regarded as common carriers and thus be subject to the restrictions and liabilities generally applicable, and be entitled to make special contracts with regard to the nature of the goods they undertook to carry.

From the fact that such mode of carriage would from the nature of things largely be international in character, it was to be expected that, in due course, some concerted action would be taken to regulate this class of traffic; and, as a result of a convention signed by representatives of the principal European and Asiatic Powers and of some of the British Dominions, at Warsaw, on the 12th October, 1929, the Carriage by Air Act, 1932, was passed to confer legislative sanction thereto, so far as this country was concerned.

Power is contained in the Act for the application of the provisions of the convention, if an Order in

Council is made to that effect, to carriage by air in this country even though not international in character.

The main provisions of the convention upon which the Act is based are as follows :—

- (1) A carriage to be performed by several successive air carriers shall be deemed to be one undivided carriage, and whether performed entirely within a single territory or not.
- (2) A carriage does not lose its international character and be excluded from the operation of the Act, where there is an agreed stopping place in the course of transit, although such stopping place is within the territory of a power which is not a signatory to the convention.
- (3) The convention applies to carriage performed by the State or by legally constituted public bodies, but does not apply to carriage performed under the terms of any international postal convention.
- (4) Passenger or luggage tickets must be issued by the air carrier, giving prescribed particulars ; but the absence, irregularity or loss of such ticket will not affect the existence or validity of the contract of carriage. If, however, the carrier accepts a passenger or luggage without a proper ticket having been delivered, he shall not be entitled to avail himself of those provisions which exclude or limit his liability.
- (5) An "air consignment note" must be made out by the consignor and delivered to the carrier ; but in this case also, the absence, irregularity or loss thereof shall not affect the

existence or validity of the contract. Such note must be prepared in triplicate, one part being marked "for the carrier," the second part "for the consignee," signed by the consignor and by the carrier, to accompany the goods. The third part is to be signed by the carrier and returned to the consignor after the goods have been accepted.

Separate consignment notes may be required by the carrier where there is more than one package.

The particulars to be recorded in the consignment note are specified in the convention, and if goods are accepted without an air consignment note having been made out, or without such note containing the prescribed particulars, the carrier is precluded from the protection afforded which excludes or limits his liability.

The air consignment note is *prima facie* evidence of the conclusion of the contract, of the receipt of the goods, and of the conditions of carriage.

- (6) Certain rights are conferred on the consignor, subject to his liabilities under the contract of carriage, to withdraw the goods at the aerodrome of departure or destination, stop them in transit, etc. If it is impossible to carry out the orders of the consignor, the carrier must so inform him forthwith.

In executing the consignor's instructions, the carrier should call for the production of that part of the air consignment note held by the former, and if he does not, he will be liable for any damage which may be caused thereby to any person lawfully in possession of such part.

The right of disposition of the consignor terminates when the title of the consignee materialises, *i.e.*, upon arrival of the goods and request to the carrier to deliver them together with the air consignment note, and conditions contained therein as to charges, etc., being duly complied with.

- (7) It is an obligation on the part of the consignor to furnish satisfactory information and attach to the air consignment note such documents as are necessary for customs purposes.
- (8) Liability attaches to the carrier in the event of the death or bodily injury of a passenger, caused by an accident on board the aircraft or in the course of embarking or disembarking, and also damage due to delay ; except where the carrier can prove that he and his agents have taken all necessary measures to avoid the damage or that it was impossible to take such measures.

Negligence on the part of the injured person may serve to exonerate the carrier either wholly or in part.

The liability in respect of passengers is limited to 125,000 French francs for each passenger. A higher sum may be agreed upon between the carrier and the passenger by special contract.

Any provision attempting to fix a lower scale shall be null and void. If the injury is due to the wilful misconduct of the carrier, he shall be debarred from the protection of the above limitation.

The sum fixed as the limit of liability shall be in substitution of that for which the carrier

might ordinarily be liable upon the death of a passenger under any Statute or at Common Law.

- (9) Similar provisions are made with regard to the destruction of, damage to, or loss of registered luggage or goods; the limitation of liability being a sum of 250 French francs per kilo, unless the consignor has made, at the time of handing the package over to the carrier, a special declaration of value and paid an increased charge if required to do so.

If the passenger retains charge of any luggage, the carrier's liability is limited to 5,000 francs per person.

- (10) (The sum in francs for which the carrier is liable shall be converted into sterling at the rate of exchange prevailing on the date on which the amount of any damages is ascertained by the Court.)
- (11) Provision is made for the lodgment of claims and the Court in which action may be brought, and the right is extinguished if proceedings are not instituted within two years from the date of arrival at the destination, or the date on which the aircraft ought to have arrived or on which the carriage stopped.
- (12) Where the carriage is to be performed by various successive carriers, unless the first carrier assumes liability for the whole journey, an action by the passenger lies only against the carrier who performed the carriage during which the accident or delay occurred. In the case of goods or luggage, the passenger or consignor may claim against the first carrier,

and the passenger or consignee may claim against the last carrier. Either person can institute proceedings against the carrier responsible for the carriage during which the destruction, loss or damage arose. The carriers are jointly and severally responsible.

- (13) Provisions are made for the application of these regulations only to the air portion of the carriage should there be a contract of carriage partly by air and partly by any other means ; for the invalidity of clauses in the contract tending to infringe the provisions of the convention ; for the validity of arbitration clauses included in a contract for the carriage of goods, etc.
- (14) As soon as this convention shall be ratified by five of the signatory Powers, it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. The other Powers may subsequently participate by ratification, and such will take effect on the ninetieth day after the deposit. Any other Powers may adopt the provisions. Provision is also made for withdrawal by any Power upon six months' notice.

In view of the fact that the convention would not operate until at least five of the signatory Powers have ratified it, the Act passed by the legislature of this country did not come into operation until an Order in Council had been made to that effect. Such Order may be framed to include the Isle of Man, the Channel Islands, any colony and any territory which is under His Majesty's protection, or in respect of which a mandate from the League of Nations is being exercised by His Majesty's Government in the United Kingdom.

SYNOPSIS OF CHAPTER IX

SECURITIES

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CHAPTER IX

SECURITIES

By the term *security* is meant some right or interest in property which is given to a creditor, so that he may, out of that property, reimburse himself the amount of his debt, or some portion of it, in case the debtor makes default.

The principal forms of security which are available as between a debtor and a creditor, in order to safeguard the creditor with the least possible prejudice to the debtor, are—

- (1) Mortgages ;
- (2) Bills of Sale ;
- (3) Pledges ;
- (4) Liens.

§ 1.—Mortgages.

A *mortgage* of land is the transaction whereby a person having an interest in land borrows money upon the security of such interest ; the person borrowing the money and giving the security is called the *mortgagor*, and the person lending the money and receiving the security is called the *mortgagee*.

(a) Legal Mortgage.

Before 1926 a legal mortgage was effected by a conveyance of the legal estate in land by one person to another, as security for money, with a condition that if the money were repaid at a certain

day with interest, the land should be reconveyed. The form of a legal mortgage was altered by the Law of Property Act, 1925, which came into force on 1st January, 1926, and which provides that the mortgagor shall not, as formerly, convey the whole legal estate in the land to the mortgagee, but where the mortgagor owns the fee simple or "freehold" shall grant him a lease of the land for a term of 3,000 years, with a proviso that the term shall cease when the money secured has been repaid. A second mortgage will be granted for the unexpired portion of the 3,000 years plus one day, and any subsequent mortgage for a term one day longer than its immediate prior mortgage (§ 85). The Act also creates a new form of legal mortgage known as a charge by way of legal mortgage, by which the mortgagor charges the land by deed with payment of the principal money and interest; the effect is precisely the same as a mortgage created for a term of years, but has the advantage of being shorter and simpler (§ 87).

Where the interest of the mortgagor in the property is leasehold, the mortgage is granted for the unexpired term of the lease, less ten days, a second mortgage for a period one day longer, and so on (§ 86).

Even though the time agreed upon for repayment has expired, the mortgagor is allowed to redeem his property on payment of the principal money, interest, and costs. This right of redemption is called the *equity of redemption*, and any provision which attempts to fetter or clog this right will be void. If a mortgagee enters into possession of the land, and retains possession for 12 years without acknowledging the title of the mortgagor, the equity of redemption is barred; similarly, if a mortgagor retains possession

of the land for 12 years without paying interest or acknowledging the title of the mortgagee, he becomes entitled to the land free from the mortgage (Limitation Act, 1939).

A mortgagee can enforce his claim for payment in the following ways :—

- (1) He may sue on the personal covenant to repay, contained in the mortgage deed.
- (2) He may by virtue of his mortgage lease, take possession of the land, though this is not usually done, because a mortgagee in possession must account very strictly, not only for rents and profits which he actually receives, but also for those which he might have received if he had exercised the greatest care.
- (3) He may apply for FORECLOSURE, which is an order of the Court fixing the time within which the mortgagor must pay off the debt, with interest and costs, or in default lose his equity of redemption. If the order of foreclosure is not complied with within the time stated therein, the land becomes the property of the mortgagee.
- (4) He may appoint a receiver when the statutory power of sale has arisen, by writing under his own hand, to receive the rents and profits of the land and apply them in payment of interest due under the mortgage.
- (5) He may sell the property under an express power in the instrument, or under an implied power given by § 101 of the Law of Property Act, 1925, which gives him power to sell not only the term of years vested in him, but the whole estate, whatever it may be, vested in the

mortgagor. Before this power can be exercised the principal money must have been due, and have remained unpaid for at least three months after notice in writing to the mortgagor demanding payment had been given ; or some interest must have been two months in arrear ; or some covenant in the mortgage deed, other than the covenant to pay principal and interest, must have been broken (Law of Property Act, 1925, § 103). Notice of the intention to exercise the power of sale must be given to the persons entitled thereto by the terms of the instrument ; and under the Law of Property Act, notice should be given to all persons entitled to redeem. The mortgagor cannot, as against other parties entitled, waive any irregularity (*Selwyn v. Garfit*, 38 Ch. D. 273).

In the case of a sale, the mortgagor is entitled to any surplus realised.

(b) Equitable Mortgage.

An equitable mortgage is a means by which a debtor creates a charge on his estate in favour of his creditor, without effecting a legal mortgage.

It may be created by deposit of the title deeds relating to the property, with the creditor, or by an agreement or declaration in writing showing the debtor's intention to make his land or property a security for the debt or money advanced.

Equitable mortgages are in common commercial use, being more simply effected than legal mortgages ; and possession of the title deeds will prevent other mortgagees from obtaining priority.

The remedy of an equitable mortgagee is by suing for the amount of the debt, or by applying to the Court for foreclosure or an order for sale.

(c) Second Mortgage.

Before 1926 a second mortgage was merely an equitable security, since the mortgagor had already parted with the whole of his legal estate to the first mortgagee; provided, of course, that the first mortgage was a legal mortgage. Under § 85 of the Law of Property Act, 1925, the mortgagor may create any number of legal mortgages of the same land, but the second and subsequent mortgages should be registered under the Land Charges Act, 1925, to protect the mortgagee against subsequent incumbrances; and in effect the security of the second mortgagee is the surplus value of the security of the first mortgagee.

(d) Contributory Mortgage.

A contributory mortgage is one where money is contributed in shares by several lenders, and the mortgage is intended to be a security to each of them separately for his share of the loan.

(e) Mortgage of Book Debts.

A mortgage of book debts is an equitable assignment or charge over book debts which are to form the security for money lent; but a mortgagee, in order to protect himself, should give notice of the assignment to the various debtors. By giving this notice the debtor concerned is prevented from paying over the moneys due by him to the mortgagor, and from pleading a set-off or other defence between himself and the mortgagor, which arises *after* he has received notice of the assignment.

If the mortgage is made in the ordinary form of conveyance with a proviso for redemption, it is "an absolute assignment, not purporting to be by way of charge only," within § 25 of the Judicature Act, 1873, (repealed and re-enacted by § 136 of the Law of Property Act, 1925), the result being that the mortgagee will in such a case become the legal assignee (*Tancred v. Delagoa Bay Company*, 23 Q.B.D. 239).

Subject to the terms of the mortgage, the mortgagee is entitled to receive moneys due by the debtors in respect of the debts mortgaged, and to set off the sums so received against principal and interest due to him under the mortgage. If there is any surplus, he is a trustee in respect thereof for the mortgagor.

The absolute assignment of book debts, present or future, or of any class of them will be void against the trustee in a subsequent bankruptcy, unless registered as an absolute bill of sale (Bankruptcy Act, 1914, § 43).

There are certain exceptions, as shown in the section quoted, but such exceptions will be deemed to be within the order and disposition of the mortgagor and will pass to his trustee in a subsequent bankruptcy, unless notice has been given to the various debtors before the receiving order and without notice by the mortgagee of an available act of bankruptcy.

Where bills of exchange drawn on customers in respect of goods supplied, but not yet accepted, have been indorsed by traders to their bankers, and before acceptance the drawer has become bankrupt, the trustee in the bankruptcy is entitled to the debts unless the bankers have by notice to the debtors taken them out of the order and disposition clause (*Re Goetz Jonas & Co., ex parte Armstrong* (1898), 1 Q.B. 787).

(f) Life Policies as Security.

A loan is sometimes secured on a life policy either of the borrower or of some other person. In such a case the lender should obtain an assignment of the policy, and give notice to the insurance company.

During the term of the policy the loan can only be regarded as secured to the extent of the surrender value of the policy; but upon the policy falling in before the repayment of the loan, any sum received in excess of the debt and interest will be held in trust for the borrower, or other person entitled thereto.

§ 2.—Debentures.

A debenture is an acknowledgment of indebtedness given under the seal of a company, and which may or may not give a charge on the assets of the company. Debentures are often in the form of bonds to bearer, but they may be registered, or issued in the form of stock.

Where a debenture is secured by a charge on the assets, such charge may take the form of a fixed or of a floating charge. A fixed charge is one whereby the freehold and leasehold property of the company, or some portion of it, is actually mortgaged to the creditor, or to trustees on behalf of the debenture-holders. Any other fixed asset can legally form the subject of a fixed charge, but such a course is not customary as operating to restrict the ability of the company to change or vary the asset if the exigencies of the business require it. A floating charge is one existing over all the assets of the company not otherwise charged, as they may exist at the date when the company makes default in the terms of its agreement with the debenture-holders.

Under the Companies Act, 1948, § 95, debentures giving a charge must be registered with the Registrar

of Companies in order that they may be valid against the liquidator of the company or any creditor.

A debenture giving no charge is called a simple or naked debenture ; it is merely of the nature of a promissory note, and does not require registration. The holder is an unsecured creditor.

§ 3.—Bills of Sale.

A bill of sale is a document whereby the property in chattels is transferred to a grantee, either absolutely or conditionally by way of mortgage, possession of the property comprised in the bill of sale remaining in the grantor.

The expression " bill of sale " includes—

- (1) Bills of sale as specifically understood ;
- (2) Assignments ;
- (3) Transfers ;
- (4) Declarations of trust without transfer ;
- (5) Inventories of goods with receipt thereto attached ;
- (6) Receipts for purchase moneys of goods, and other assurances of personal chattels ;
- (7) Powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt ;
- (8) Any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred.

The following classes of instruments do not fall within the definition :—

- (1) Assignments for the benefit of the grantor's creditors ;
- (2) Marriage settlements ;

- (3) Transfers or assignments of any ship or any share thereof ;
- (4) Transfers of goods in the ordinary course of business ;
- (5) Bills of sale of goods in foreign parts or at sea ;
- (6) Bills of lading, India warrants, warehouse keeper's certificates, delivery orders used in the ordinary course of business (Bills of Sale Act, 1878, § 4) ;
- (7) An instrument charging or creating any security on or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being reshipped for export, or delivered to a purchaser not being the person giving or executing such instrument (Bills of Sale Act, 1890, § 1, as amended by the Bills of Sale Act, 1891).

It must be admitted that the definition is somewhat unsatisfactory inasmuch as bills of sale as generally understood are referred to therein, and since the execution of such instruments is subject to certain stringent conditions, one would be quite justified in asking why such conditions are imposed when so many instruments of an extraneous character, and with apparently no formality involved in their execution, are included under the Act. It must be remembered that the primary objects of the Bills of Sale Acts are to protect both the grantor and the grantee where chattels remaining in the possession of the former form the security for a loan made by the latter ; but third parties must also be protected, as they may be induced to enter into financial relations with the possessor of the chattels on the strength of such possession. Many arrangements other than bills of sale strictly so named, may involve the retention

of the goods after a charge has been created ; hence the provision for registration which would act as constructive notice to interested parties.

The expression "personal chattels" which may form the subject of a bill of sale, means goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures or growing crops. Trade machinery, with specified limitations, is also so regarded. It will be observed that a bill of sale cannot be given in respect of any chose in action.

Bills of sale as generally understood may be divided into two classes, namely, absolute and conditional.

(a) Absolute Bills of Sale.

Absolute bills of sale are governed by the Bills of Sale Act, 1878. In transmissions by way of an absolute bill of sale there is an absolute parting with the property in the chattels by the grantor, who has no right of redemption.

An absolute bill of sale need not be in any specified form, but it must show the consideration for the transaction (if any), and must be explained to the grantor by a solicitor, and witnessed by a solicitor. The grantee may insert any conditions he pleases as to when he shall be entitled to take possession.

(b) Conditional Bills of Sale.

A conditional bill of sale is one given as security for the payment of money, the grantor having the right to have the chattels reconveyed to him upon fulfilling the condition. Such bills are governed by the Bills of Sale Act (1878) Amendment Act, 1882.

A conditional bill of sale need not be explained by a solicitor, or witnessed by a solicitor, but it must be witnessed by at least one credible witness. It must also

be in the exact form given in the Schedule to the Act (§ 9), and must show the consideration, which must not be less than £30 (§ 12), also the rate of interest, the date for repayment, and any condition on the fulfilment of which the bill is to be void. An inventory of the personal chattels comprised in the bill must be attached.

The grantee can only seize the goods comprised in the bill of sale for one of the conditions mentioned in the Act. These are—

- (a) Failing to perform the covenants ;
- (b) Bankruptcy, or allowing distraint to issue for rent, rates or taxes ;
- (c) Fraudulently removing the goods ;
- (d) Failure without reasonable excuse to produce the last receipt for rent, rates or taxes after written demand ;
- (e) Allowing execution to issue (§ 7).

Even after seizure the goods cannot, without consent of the grantor, be removed from the premises or sold for five days, and within such five days the grantor may apply to the Court for relief if by payment or otherwise the cause of seizure no longer exists (§ 13).

(c) Registration of Bills of Sale.

Every bill of sale, whether absolute or conditional, must be registered within seven days of execution ; and re-registered every five years. If executed out of England, registration must be effected within seven days after the time in which it would, in the ordinary course of post arrive in this country, if posted immediately after execution. There must be produced to the registrar the original bill, with a true copy of it and every schedule or inventory attached to it ; an affidavit of due execution, stating the time

it was given, and a description of the residence and occupation of the grantor and all other attesting witnesses. A conditional bill of sale must have attached a schedule specifically enumerating the chattels comprised in it, and chattels afterwards acquired cannot be included, except by way of substitution (§ 6).

If the omission to register arises from accident or inadvertence, the judge may make an order extending the time for registration.

(d) Form of Conditional Bill of Sale.

The following is the form of a conditional bill of sale :—

THIS INDENTURE made the _____ day of _____
One thousand nine hundred and _____ BETWEEN
_____ of _____
of the one part and _____
of _____
of the other part WITNESSETH that in consideration of the sum of (a)

(a) Or what-
ever the con-
sideration may
be

the receipt of which the said _____ hereby acknowledges
He the said _____ doth hereby assign unto
_____ his executors administrators and assigns
All and singular the several chattels and things specifically described in
the schedule hereto annexed by way of security for the payment of the
sum of _____ Pounds

(b) Insert the
rate

and interest thereon at the rate of (b) _____ per cent. per annum.
And the said _____ doth further agree
and declare that he will duly pay to the said _____
the principal sum aforesaid together with the interest then due by
equal _____ payments of _____
on the _____
in each and every _____

And the said _____
doth also agree with the said _____
that he will (c)

(c) Insert
terms as to in-
terest pay-
ment of rent or
otherwise
which the per-
son may agree
for the main-
tenance of the
premises or de-
vice of the
premises

Provided always that the chattels hereby assigned shall not be liable to
seizure or to be taken possession of by the said _____
for any cause other than those specified in § 7 of the Bills of Sale Act (1875)
Amendment Act, 1882. In WITNESS whereof the parties to these presents
have hereunto set their hands and seals the day and year first above
written.

Signed and sealed by the said _____
in the presence of me (d)

Add wit-
nesses, and
signature.

THE SCHEDULE ABOVE REFERRED TO

It has already been stated that the form must be strictly followed, and if this is not done the conveyance may be void; thus separate conveyances by separate grantors of goods belonging to them separately cannot be made on one form (*Saunders v. White* (1902), 1 K.B. 472); and the bill will be void if the name, address, and description of the grantor, grantee, or witness are omitted (*Parsons v. Brand*, 25 Q.B.D. 110; *Alltree v. Alltree* (1898), 2 Q.B. 267); or if the receipt clause is absent, or if the copy filed discloses even a trifling error (*Burchell v. Thompson* (1920), 36 T.L.R. 257, C.A.). A term introduced to enable the grantee to retain a bill of sale after payment of the debt will also avoid the bill (*Watson v. Strickland* (1887), 19 Q.B.D. 391); and so also will any term which has the effect of introducing covenants not contained in the statutory form, such as, for instance, incorporating terms by reference to another document (*Lee v. Barnes*, 17 Q.B.D. 77). Even though the transaction is not capable of being given effect to in the statutory form, this will not form an excuse for departing from it (*ex parte Parsons* (1886), 16 Q.B.D. 532).

§ 4.—Pledges.

The contract of pledge is one which at common law is considered to be for the mutual benefit both of the pledgor and pledgee. It involves an actual delivery by the pledgor of the article pledged, either to the pledgee or to a warehouse for him; in either case a receipt being given for the pledge.

Where the possession itself is actually impossible, it may be given constructively by the delivery of a key, under such circumstances that full

control of the place where the goods are stored is given by the delivery of such key. The actual property in the goods pledged remains with the pledgor, but a special property passes to the pledgee, in order that he may dispose of the goods when he becomes entitled to do so.

A pledgee impliedly undertakes to deliver back the property to the pledgor upon repayment of the sum advanced upon the property, and the pledgor impliedly warrants his own title to the property.

When the pledgee has the property in possession, he is answerable for any ordinary neglect in respect of it⁶; even if it is stolen from him he will be liable to make good the loss, unless he can show that he used ordinary care in respect of it. If the property is taken from him by robbery (*i.e.*, theft with violence), however, he is excused from liability in respect of it.

Upon default in payment being made by the pledgor, the pledgee may sell the property at the stipulated time or after giving proper notice.

The pledgee has not any right to use the goods pledged, unless to do so would be for the benefit of such goods.

It is a common practice for stockbrokers and others to raise money by the pledge of securities, the contract for the loan generally providing that in consideration of the advance of the amount concerned at a given rate of interest, securities as mentioned in a memorandum lodged at the time, are to be held by the person making the advance as collateral security for the due repayment of the loan and interest.

The person depositing the security generally undertakes that the security shall exceed the loan

by an agreed margin, and if the margin at any time becomes deficient, to provide additional security to the satisfaction of the lender; and the borrower, in the event of failure to deposit additional security when required, or to pay the loan when it becomes due, authorises the pledgee to realise the securities for the purpose of paying himself the sum due to him; and undertakes to pay any deficiency on, and the expense of, realisation.

No difficulty arises where the securities so deposited are bearer securities. Where, however, they are in the form of registered stocks or shares, it is usual for the lender to require such stocks or shares to be transferred into his own name; since if the lender relies upon a blank transfer only, and the transferor for the purpose of defrauding the owner of the blank transfer, obtains a duplicate certificate from the company and executes another transfer, the transferee will have a good title to the shares on registration of his transfer, and the blank transfer may be defeated (*Peat v. Clayton* (1906), 1 Ch. 659).

The distinction between a mortgage and a pledge should be carefully noted. In the case of a mortgage, the legal ownership or an equivalent interest is transferred to the person lending the money, possession remaining with the borrower; whereas in the case of a pledge, the legal ownership remains with the borrower, possession being transferred to the person lending the money.

Pawnbrokers are persons licensed to carry on the business of lending money on goods taken into pawn. They are governed by the Pawnbrokers Act, 1872, which applies only to loans of £10 or less. Pledges above that amount are governed by the rules of

common law, and by special contract. Such contracts may be made in respect of loans exceeding 40s., but in such cases a special pawn-ticket must be given by the pawnbroker, signed by him, a duplicate being also signed by the borrower (§ 24).

The rate of interest that may be charged in respect of loans not exceeding 40s. is limited to one half-penny for every 2s. or part per month (increased by the Pawnbrokers Act, 1922, by an additional half-penny for every 5s. or part). After the first month, less than fourteen days is counted as half a month, fourteen days and not exceeding one month as one month. The charge for the ticket is one half-penny, but if the pledge is for more than 10s. it is one penny. On pledges above 40s. the interest is limited to one half-penny per month for each 2s. 6d. or part (§ 15).

The goods pledged are made redeemable within twelve months from the day of pawning, including that day, with seven days of grace added (§ 16). If the pledge is for 10s. or under, it becomes the absolute property of the pawnbroker at the expiration of the time when it ceases to be redeemable; if the pledge is for more than 10s., it is redeemable until actual sale which must be by auction (§ 17).

A pawnbroker must give a pawn-ticket in respect of each pledge (§ 14); he must keep books and allow the ticket holders to inspect them (§§ 12 and 21); he must also account for surplus receipts on sales within three years where the pledge is for over 10s. (§ 22).

The holder of a pawn-ticket is presumed to be the person entitled to redeem the property (§ 25), and the pawnbroker must deliver the property to

him on payment of the loan and interest; but where a person's goods have been pledged without his authority, he may recover from the pawnbroker, so long as the person making the pledge could give no title to the property. (*See* Chap. III, § 2 (b).)

If a pawn-ticket is lost, a new ticket may be obtained by a declaration before a magistrate; the ticket thus obtained to be shown to the pawnbroker within three days, after which the pawnbroker must not deliver to the holder of the original ticket (§ 29).

If the goods pawned are destroyed by accidental fire, the pawnbroker is responsible for the loss. If he purchases, except at a public auction, any article pledged to him, he commits an offence under the Act (§ 32).

§ 5. -Liens.

(a) Possessory Liens.

A *possessory* lien is the right of a person in possession of goods which belong to another, to retain such goods until his pecuniary demands against that other are satisfied (*Hammond v. Barclay*, 2 East 235). Possessory liens are either general or particular.

(1) *General Lien.*

A *general* lien is the right which arises by custom in particular trades or professions, or by contract, to retain goods not only until any sum due in respect of them is paid, but also in respect of any sum which may be owing by the owner to the person in possession.

A solicitor has a general lien over all the papers of his client, except his will; a factor on the goods of his principal; and other classes of persons who have a general lien are bankers, wharfingers, dyers, and cotton printers.

(2) *Particular Lien.*

A *particular* lien is the right to retain goods until payment of any sum due to the possessor by the real owner *in respect of those goods*.

A particular lien arises—

- (a) When the person in possession has bestowed labour, skill or expense in altering or improving the goods (*Franklin v. Hosier*, 4 B. & Ald. 341); there is no common law lien for maintenance only (*Hatton v. Car Maintenance Co.* (1915), 30 T.L.R. 275).
- (b) Where the person in possession is compellable to receive the goods, or render the service out of which the lien arises (*Yorke v. Grenaugh*, 2 Ld. Raym. 866).
- (c) Where the person in possession has saved the goods from loss at sea or capture by an enemy (*Hartford v. Jones*, 1 Ld. Raym. 393).

There is no lien until the work contracted for is actually performed; but if the owner prevents completion of the work, the lien attaches for the work actually done. If the owner has not authorised the work, the lien cannot be enforced against him, but subject to his rights it can be enforced against the person at whose request the work was done.

The most common cases of a particular lien are those of carriers (*see* Chap. VIII, § 2), tradesmen who have expended labour for reward upon the goods, an unpaid seller of goods (*see* Chap. III, § 3 (b)), and warehousemen who are entitled to reward for their services in connection with the goods.

An innkeeper's lien is of a special character: it is not *particular*, for the debt does not necessarily arise

in respect of the goods detained but from the supply of accommodation and refreshment, and it is not *general*, inasmuch as the innkeeper is not entitled to exercise the right in regard to charges incurred by the guest upon the occasion of a previous visit. (*See* Chap. VII, § 5.)

An accountant probably has a lien on account books for charges incurred in the writing-up of such books (*Burleigh v. Ingram Clark, Ltd.* (1901), 27 Acct. J.L.R. 65), although this is now doubtful in the case of a limited company as such books have become statutory books under the Companies Act, 1948; but it is doubtful whether an auditor has such a right in respect of books which he has audited, even though he properly obtains absolute possession of such books, and improves the records therein during the course of his audit.

(b) Maritime Liens.

A *maritime lien* is a right which consists of the power to have a ship or cargo and certain interests therein realised, and the proceeds applied in satisfaction of the sum due to the person having such lien. Maritime liens do not depend on possession, but attach to the subject-matter, wherever it may be.

The principal maritime liens so arising are those of—

- (1) Bottomry bond-holders;
- (2) Master for wages and disbursements;
- (3) Sailors for services rendered;
- (4) Seamen for wages;
- (5) Ship damaged by collision, against the ship in default.

When the master borrows money upon the ship, or upon the ship and cargo, the instrument by which he engages to repay the sum borrowed is called a **BOTTOMRY BOND**. He must not raise money on bottomry unless it is absolutely necessary for the completion of the voyage; and then only if he cannot obtain it on the shipowners' personal credit, or from the owners' agent, and he is unable to communicate with the owners. It is a peculiarity of the bottomry bond that if the ship is lost the lender loses the whole of his money, but if it returns in safety then he recovers the principal and interest agreed upon.

If a bottomry bond purports to make the loan repayable in any case, it is not a good bond (*Simonds v. Hodgson* (1835), 3 B. & Ad. 56); but the owner may make himself personally liable by collateral agreement (*Willis v. Palmer* (1860), C.B. 360-361).

The claim of a bottomry bondholder ranks for payment out of the security in priority to any mortgage but subsequently to any sum due for wages after the issue of the bottomry bond or salvage. As between several bottomry bondholders in relation to the same vessel, the order of payment is the reverse of the order in which the bonds were created, *i.e.*, the last bond given is the first for payment, and so on.

Since the holder of a bottomry bond has a lien on the vessel, the vessel cannot be disposed of without discharge of the bond. If the sum secured is not paid by the shipowner, the Court may order the ship to be sold with a view to discharging the liability, subject to the claims of those who may have a prior right.

A bottomry bond can only be given for money advanced for the ship; it cannot be given in respect

of a personal debt of the master of the ship, nor for matters which do not fall within the scope of his authority as master. The contract must contain, at the time it is entered into, an intention to raise money by a bottomry bond, and if the instrument is not a bottomry bond it cannot afterwards be turned into one (*The Karnak* (1869), 2 A. & E. 301).

The cargo can only be hypothecated if it receives some actual or possible benefit from the transaction (*The Gratitude* (1801), 3 C. Rob. 261); and the master can only bind the cargo owners after communicating with the owners, or endeavouring to do so (*The Hamburg* (1864), B. & L. 253), unless such notice is not required by the law of the country in which the ship is registered.

The relationship of agency between the cargo owners and the master will only be established in a case of very urgent necessity (*The Pontida* (1884), 9 P.D. 180).

The bond by which a cargo alone is hypothecated is known as a **RESPONDENTIA BOND**.

(c) **Equitable Liens.**

An *equitable lien* is the right to have certain property applied in a particular manner. It differs from a possessory lien in that it exists irrespective of possession and confers on the holder the right to a judicial sale. The partnership lien is an example, and consists of the right of a partner on dissolution to have the firm property applied in the payment of the liabilities of the firm, and any surplus divided among the partners in the proper proportions. Also, where a partnership contract is rescinded on the ground of fraud or mis-

representation of one of the parties thereto, the party entitled to rescind has, *inter alia*, a lien on the surplus of the partnership assets, after the discharge of the partnership liabilities, for whatever sum has been paid by him in the purchase of his share and for the capital contributed by him (Partnership Act, 1890, § 41).

Other examples are the lien of a vendor of land for unpaid purchase money, and the lien of a purchaser for prematurely paid purchase money, such as a deposit paid by him on the signing of the contract to purchase.

In general, a person who has expended money for the benefit of another or on another's property has no lien in respect of such expenditure, but, when all parties interested in property act in the mistaken belief that one of them is the true owner and allow him to spend money for the preservation of the property, that one is entitled to an *equitable lien* on the property for the sums so spent by him.

Re Foster ; Hudson v. Foster ((1938), 159 L.T.R. 279).

A father took out a policy of life assurance on the life of his son. The father paid the premiums until his death, and thereafter the son continued to pay them under an arrangement between all parties interested in the policy, in the belief that the policy belonged to him. The son died, and the insurance company, without raising any question as to whether the father had such an insurable interest in his son's life as to make the policy valid, paid out the proceeds on the joint receipt of the personal representatives of the father and the son, and questions arose as to how the moneys should be applied.

Held : That on the facts the father had created no trust in favour of the son, and accordingly the policy moneys belonged to the father's estate, subject to a lien in favour of the personal representatives of the son for the amount of the premiums paid by him subsequent to the father's death.

(d) Discharge of Liens.

A lien is put an end to by payment of the debt, or balance of account, as the case may be ; or by giving of credit for the amount due ; or by lawfully losing possession of the property ; or by acceptance of security, if the intention is to discharge the lien.

CHAPTER X
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CHAPTER X

PARTNERSHIP

PART I

THE PARTNERSHIP CONTRACT

[References to Sections throughout the text are to the Sections of the Partnership Act, 1890, unless otherwise stated]

§ 1.—Introductory.

The Law of Partnership is principally contained in the Partnership Act, 1890, and in the Limited Partnerships Act, 1907, the former consolidating the law then existing into the form of a code, and the latter amending it to permit of limited liability under defined conditions.

The Partnership Act, 1890, is declaratory of the Common Law, to which it made few alterations; and by Section 46 of the Act it is provided that the rules of equity and of common law applicable to partnership shall continue in force, except so far as they are inconsistent with the express provisions of the Act.

As between partners the Act is of the utmost importance, for, although the relation existing between partners is one of contract, many terms of the partnership agreement, if not expressed in such contract, are implied by the Act. It follows that the provisions of the Act, so far as they affect the partnership relation, are frequently inapplicable to particular cases, by reason of specific contract, or of a course of dealing between the partners from which such a contract is to be implied.

It is important to remember not only that the partnership agreement is a contract, but that it

is one of the class of contracts known as *uberrimae fidei*. The partnership relation is founded on mutual trust, and as between partners the law requires the utmost good faith, and disclosure of all material factors.

The Limited Partnerships Act, 1907, is a purely legislative enactment, introducing into the Statute Book the principle of limited liability in partnerships. It defines the conditions under which such partnerships may exist; and imposes upon them certain modifications of the ordinary partnership law, which is otherwise applicable to limited partnerships.

§ 2. -Definition of Partnership.

The term "Partnership" is defined by Section 1 of the Partnership Act, 1890, as —

The relation which subsists between persons carrying on a business in common with a view of profit.

This definition must be read in conjunction with Section 2 of the Act, which lays down certain rules for determining whether a partnership does or does not exist.

This section, which for all practical purposes re-enacts the provisions of Bovill's Act, 1865, is dealt with in some detail later (at *post* p. 474), but it is useful to note here that persons may—

- (a) Hold property in common with others, and take a share in any profits made by the use thereof;
- (b) Share gross returns, whether from property held under Joint Tenancy etc.;
- (c) Share in the profits (*i.e.*, net profits) of a business, without thereby being partners and liable as such.

The Limited Partnerships Act, 1907, still further modifies the definition.

It will be seen, therefore, that arrangements may be legally entered into, which may appear similar to partnership, but which, in fact, are not partnerships.

Many attempts have been made to define partnership precisely, the most notable of these being the definition of Sir Frederick Pollock, which emphasises the two principles which are at the root of the matter of partnership, *i.e.*, the agency which establishes relationship with the outside world, and the agreement which governs the relation of the partners *inter se*.

“ Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them.”*

A careful study of either of these definitions will show that “ business ” is an essential factor of partnership. A business of some description must be carried on by or for the partners with a view to profit ; and the question therefore arises as to what constitutes a business within the meaning of the Act.

The term “ business ” is defined by Section 45 of the Act, as including every trade, occupation, or profession.

“ Occupation ” is undoubtably the wider term ; and whereas a business must necessarily be an occupation, an occupation need not necessarily be a business within the meaning of the Act. Consequently, if two or more persons are engaged in an occupation, as opposed to a business, there can be no partnership.

* Pollock's definition was formulated some time before the Partnership Act, 1890.

The following instances may serve to explain the foregoing remarks :—

- (1) A. and B. are joint owners of a ship which they let out, sharing the proceeds.

This arrangement does not, as such, constitute a partnership between A. and B.

- (2) A. and B. are landowners whose whole time is taken up in managing their joint estate, and their efforts are rewarded with profits.

They are engaged in an occupation and not a business.

- (3) A. enters the profession of a barrister. This is not a business within the meaning of the Act, since partnership is forbidden between barristers, *as barristers*.

Joint Ownership, Joint Tenancy, etc., are distinguished from partnership, by reason of the fact that there is no presumption of agency in dealing with the property. In such cases a partnership can only exist by express contract, from which the additional factor of agency will arise.

§ 3.—Definition of Partner.

There is no statutory definition of the term “partner,” and therefore to ascertain whether or not a person is a partner, it is necessary to consider whether a partnership exists.

This is often by no means a simple matter, and yet it is of great importance, since, if a partnership is proved to exist, each of the general partners becomes personally liable for the whole of the debts of the firm.

Partners may be divided broadly into two classes :

(a) General Partners.

(b) Limited Partners, under the Limited Partnerships Act, 1907.

(a) General Partners.

A *general partner* is one who carries on business in partnership with another or others, and whose liability for the debts and obligations of the firm is unlimited.

He can bind the firm in his dealings with the outside world in ordinary matters connected with the firm's business, provided the persons with whom he deals are unaware of any restriction upon his authority.

The expression "partner" includes both *acting* and *dormant* partners, the liability of the latter for the debts of the firm being the same as that of the former, since no distinction is drawn in the Act itself.

Where, however, the dormant partner is a *secret* partner, it may not be necessary for him to notify his retirement from the firm by advertising in the *Gazette*, in order to escape liability for debts contracted after he left the firm, since nobody could have given credit to the firm by reason of him being a partner (*Heath v. Sansom* (1832), 38 R.R. 237, 242). Where, however, disclosure has been made under the Registration of Business Names Act, 1916, such notification will be necessary ; and it is always wise for a dormant partner to give notice of retirement, since it might be difficult to rebut the claim of a person subsequently professing to have known that the retired partner was a member of the firm, and to have given credit on the strength of that knowledge.

(b) Limited Partners.

A *limited partner* is one who contributes capital to a firm without being liable for the debts or obligations

of the firm beyond the amount so contributed. To obtain this limitation of liability the firm must be registered under the Limited Partnerships Act, 1907.

A limited partner cannot in any way bind the firm, nor can he take any part in the management thereof. He may, however, advise with the general partners as to the state and prospects of the business.

The rules and regulations contained in the Limited Partnerships Act, 1907, must be rigidly adhered to, in order to prevent a limited partner from becoming liable as a general partner.

§ 4.—Capacity to enter into the Partnership Contract.

There are certain classes of persons whose capacity to enter into the contract of partnership is somewhat restricted, the most important of these being lunatics, infants, married women, and convicts.

(a) Lunatics.

A lunatic is capable of entering into a partnership contract during a period of sanity. If, after the partnership has commenced, he asserts that at the time the contract was entered into he was lunatic, he cannot escape from the liability attaching to a partner, unless he proves that he actually was insane at the time, and that the party with whom he entered into the contract knew of his insanity. Otherwise the lunatic partner is both capable of binding the firm as a partner, and liable to be bound by his co-partners.

Under Section 35 (a) of the Act, lunacy is ground for application to the Court to decree a dissolution: but it is not necessarily ground for dissolution if a limited partner becomes a lunatic (Limited Partnerships Act, 1907, Section 6 (2)).

(b) Married Women.

Under the Married Women's Property Acts, 1882 and 1893, married women generally could only render themselves liable upon any contract to the extent of any separate property ; such property being either in possession at the time of entering into the contract or subsequently acquired. Any judgment obtained in consequence of a right of action arising out of a contract with a married woman could only be enforced against her separate property, and even then only so long as such property was not settled with a restraint on anticipation.

This position has been altered by the Law Reform (Married Women and Tortfeasors) Act, 1935, which provides that a married woman may render herself liable in respect of any tort, contract, debt or obligation and be capable of suing or being sued in all respects as if she were a *feme sole*.

There is, therefore, nothing to prevent a married woman from entering into partnership, even the few disadvantages which formerly existed from the view-point of her co-partners now having been removed.

(c) Infants.

An infant's power of contracting is restricted both by Statute and by Common Law, and, save in exceptional cases, the only way by which he can make himself legally liable for contracts is by purchasing necessities. In this case it is possible for him to be adjudicated bankrupt, but not while he remains an infant (*ex. p. Jones, re Jones* (1881), 18 Ch. D. 109). He cannot, however, be adjudicated bankrupt in respect of any debts contracted by the firm of which

he is a partner ; the result being that the remedy of creditors is only against the adult members of the firm.

The adult partners, however, have a right to exercise their equitable lien upon the partnership assets, and to see that these are applied in payment of the partnership debts.

After attaining his majority, an infant partner may ratify the partnership contract, either expressly or by implication ; but if he wishes to avoid the contract, he must express his determination immediately and without ambiguity, since if he does not do so he will become liable for all debts contracted after his majority (*Goode v. Harrison* (1821), 5 B. and Ald. 159). If he repudiates the contract immediately upon coming of age, he can only recover his share of the partnership fund as then ascertained unless he can show that he has never received any benefit under the contract (*Hamilton v. Vaughan-Sherrin, & Co., Co.* (1894), 3 Ch. 594, and *cf. Steinberg v. Scala, Leeds, Ltd.* (1923), 2 Ch. 452, C. A.), in which case he could recover all sums invested in the partnership, including any premium paid. The infant, however, cannot claim to be credited with profits, and not debited with losses, and he is bound by the partnership accounts as between himself and his co-partners.

(d) Convicts.

A convict is incapable of making contracts, conveying property, or bringing any action, except when he is at large under a ticket-of-leave.

The Crown, in the case of the sentence of any person to death or penal servitude, may commit the custody and management of the property of such convict to an administrator, in whom all the property of such

convict becomes vested. The effect of this is to ensure that upon dissolution of partnership, by reason of felony or outlawry of one of the members, the interests of such person will be legally safeguarded.

§ 5--Illegal Associations.

Under Sections 357 and 358 of the Companies Act, 1929, the maximum number of persons who can carry on business as partners is ten in the case of a banking business, and twenty in other cases.

Section 34 of the Partnership Act, 1890, declares that a partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on, in partnership.

By the Solicitors Acts it is illegal for a solicitor to enter into a partnership agreement, *as a solicitor*, with an unqualified person : this is a case of a partnership which, though it may have a perfectly legal object, is prohibited by Statute.

It is illegal for persons to enter into a partnership with an illegal object in view, as for instance for the purpose of conducting lotteries ; in this case it is the object of the partnership itself which is made illegal by Statute.

Partnerships may also be illegal at Common Law upon the grounds of public policy, *e.g.*, a partnership entered into for the commission of a crime.

There is nothing to prevent the existence of a partnership between a British subject and the subject of a foreign country ; but if war should be declared between the two countries of which the partners

are subjects, the partnership may be immediately dissolved. The application of the law on this point does not rest on the domicile of origin of the parties, but on the actual domicile at the time of the war ; so that if two Englishmen in partnership reside, the one in England and the other in a country with which England is at war, they cease to be partners in the eye of the law ; whereas if England is at war with a Foreign State, and a subject of that state is in partnership with an Englishman, both being resident and carrying on the partnership business in this country the partnership contract is not affected.

If one of the partners is or was immediately before the war a subject of, or resident or carrying on business in a hostile state, the Board of Trade may appoint an inspector of the books ; and may, if necessary, appoint a controller with power to wind up the business ; and any monies payable to an enemy subject will be paid to the custodian, *i.e.*, the Public Trustee (Trading with the Enemy Act, 1914, Section 2).

Where a partnership with an enemy is thus disclosed, his interest in the partnership is not forfeited, any amounts appearing to be due to him being payable to the custodian. If the business makes use of patents or other property of the enemy, the enemy is entitled to fair remuneration for its use, the same being payable to the custodian (*Hugh Stevenson & Sons v. A.G. für Cartonnagen-Industrie*, 34 T.L.R. 206).

Illegality is never presumed, but must always be proved by those who assert its existence.

Persons associated together in an illegal partnership are incapable of exercising their rights against third parties, though in most cases third parties can exercise

their rights against them, *e.g.* an illegal partnership can be sued, but is incapable of suing. The parties themselves, as a general rule, will be unable to enforce any rights against each other as partners.

A partnership may exist in law in respect of a betting and bookmaker's business (*Jeffrey & Co. v. Bamford* (1921), 2 K.B. 255).

§ 6.—The Legal and Mercantile Idea of a Partnership.

By the ordinary business man a firm is regarded as possessing a corporate entity, apart from the members composing it. Although this is legally the case in Scotland, in England the law goes no further than to recognise the members of a partnership collectively as a "firm."

Section 4 of the Partnership Act, 1890, confirms this for the purpose of the Act, and also declares that the name under which the business is carried on is called the "Firm Name."

Under the Rules of the Supreme Court, however, actions may be taken by or against partners, claiming or liable as partners, in the name of the firm of which they are members; but it is also necessary for the names and addresses of the individual partners to be declared. This procedure also applies by the Rules to those cases where a firm brings an action against one of its own members, and to actions between firms having one or more members in common.

§ 7.—Partnership Agency.

It has been already stated that the partnership contract is founded on mutual trust and confidence;

but it must be borne in mind that when the partnership contract has been entered into, the relation of principal and agent exists between partners. This aspect of agency is peculiar to Partnership Law, inasmuch as each partner is a principal as well as an agent.

As a member of the firm, each partner is a principal, so far as he himself is concerned, and an agent so far as his partners are concerned, for acts done within the ostensible scope of his authority on behalf of the firm.

Since each partner is a principal as well as an agent, a partner is not, like an ordinary agent, entitled to a full indemnity from his co-partners for losses incurred in properly carrying out his duties, but is entitled only to an average contribution, *i.e.*, he must himself contribute, as a principal, his share of the loss.

Section 5 of the Act, in declaring the power of a partner to bind the firm as agent in respect of any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, specially provides that where, to the knowledge of the party dealing with him, the partner has no authority, the firm is not bound; and a similar proviso applies where such party does not know or believe him to be a partner.

The liability of a firm for the acts of its partners is therefore dependent upon the existence of agency between the partners. Such agency, whilst commonly existing by implication only in respect of ordinary business matters, is not put an end to by a secret limitation of authority: but it can be put an end to by express agreement, or limitation, *communicated* to third parties.

In all cases, what is ordinarily necessary for carrying on the business will depend upon the nature of the business.

§ 8.—Rules for Determining whether a Partnership exists or not.

It has already been stated that Joint Tenancy, Common Property, Part Ownership, and the sharing of gross returns do not *of themselves* create a partnership. There are, in addition to these, other cases, in which it is somewhat difficult to state with certainty whether or not an individual receiving income from the profits of the business is or is not a partner.

The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment, contingent on or varying with the profits of a business, does not *of itself* make him a partner in the business ; and in particular—

- (a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such ;
- (b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business, does not of itself make the servant or agent a partner in the business or liable as such ;
- (c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason

only of such receipt a partner in the business or liable as such ;

- (d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business, or liable as such ; **provided that the contract is in writing, and signed by or on behalf of all the parties thereto ;**
- (e) A person receiving by way of annuity or otherwise a portion of the profits of a business, in consideration of the sale by him of the goodwill of the business, is not by reason only of such receipt a partner in the business, or liable as such (Section 2 (3)).

It will therefore, be observed that the receipt of a share of the net profits by a person is *prima facie* evidence that such person is a partner, but that to prove a partnership it is necessary to show the existence of other incidents of the partnership relation.

In the cases referred to above, however, it is definitely declared that the facts stated do not *of themselves* create a partnership ; but this will not prevent a partnership being shown to exist where such is actually the case.

An agreement between parties that they shall not be regarded as partners will not prevent them being liable as such if the agreement is merely a colourable pretext ; and in these cases it is necessary to look at all the circumstances.

In order that parties sharing in profits shall be liable as partners, it is necessary that the business should have been carried on on their behalf, or that they should have exercised some of the rights of partners; as, for instance, the right to demand an account, to direct how the business shall be carried on, or to state when it shall be wound up.

It should be noted that in any event where a person lends money in consideration of a rate of interest varying with the profits, or where a person takes a proportion of the profits in consideration of the sale of goodwill, he is by Section 3 of the Act, *deferred* to the other creditors of the business in case of the insolvency of the person or persons to whom the money is lent or who purchases such goodwill. This Section will apply even where the borrower, or purchaser of goodwill is a sole trader.

The Limited Partnerships Act, 1907, which will be referred to more fully later, has now legalised the formation of partnerships under which persons may lend money, under the conditions contemplated, without incurring any further liability than that agreed upon when the contract of partnership is entered into. It may be doubted, however, whether the position of a person who advances money in consideration of a share of the profits has been materially improved by the Limited Partnerships Act, 1907.

It is true that under this Act, the money can be advanced to the firm as if it were a person—a thing which could not previously be done; but on the other hand, there are the disadvantages of publicity and increased expenses, and the impossibility of withdrawing from the firm the capital advanced thereto, although the interest in the firm may be transferred to another person with the consent of the other partners.

A person advancing money under the principal Act was a deferred creditor, but nevertheless a creditor; while under the Limited Partnerships Act, 1907, such a person is a partner, and bound to contribute to losses not only as regards outside creditors, but as between partners themselves, to the extent of the agreement.

In either case, any interference in the management of the business entails liability as a general partner.

The following are a few cases illustrating that no hard-and-fast rules can be laid down as to whether or not a general partnership exists. It will be seen that a partnership may exist without the knowledge of the parties, and even where the intention of the parties was that no partnership should exist. The facts in each case must be carefully considered, and as Lord Lindley said, in the course of his Judgment, in the case of *Walker v. Hirsch* ((1884), 27 Ch.D. 460), particulars of which are given below, "Persons who share profits and losses are, in my opinion, properly called partners; but that is a mere question of words. Their precise rights in any particular case must depend upon the real nature of the agreement into which they have entered."

(a) 1860, *Cox v. Hickman* (8 H.L.C. 268, 306)

A trader carries on his business under the supervision of his creditors, who are to be gradually paid off out of the profits arising from the business

Held That no partnership existed between the trader and the creditors.

(b) 1876, *Syers v. Syers* (1 App. Ca. 174).

In consideration of £250 lent by B., A. undertook to execute a deed of co-partnership for one-eighth share of the profits of a Music Hall and Tavern, under the Limited

Partnership Act, 28 & 29 Vict. c. 86 (Bovill's Act, now repealed and replaced by Sections 2 and 3 of the Partnership Act, 1890).

Held: That this was an ordinary partnership, and not a loan contract; though as between the parties B. was not liable for losses.

(c) 1876, *Pooley v. Driver* (5 Ch. D. 458).

B. & H. enter into partnership. The capital of the business was £30,000, of which B. & H. provided £20,000, the remaining £10,000 to be raised by way of loan under the Partnership (Bovill's) Act, 1865, in sums of £500, from persons willing to advance the same for the purposes of the partnership. Each lender became entitled to a *pro rata* share in the capital of the business, and profits were shared between B. and H. and the persons making advances, in accordance with the amount contributed. B & H. agreed to conform to the partnership deed, which was open to the inspection of persons making advances, and such deed provided that upon the conclusion of the partnership an account should be taken, that B & H. were to pay the amount advanced by way of loan, and then to divide the balance remaining between themselves, and that persons making an advance were subject to refund sums overpaid on account of profits, and it also contained an Arbitration clause.

Held That the parties were liable as partners for the debts, the Master of the Rolls stating in his judgment that he did not rely on one or two provisions, but on the whole character of the transactions from beginning to end.

(d) 1877, *ex parte Tenant* (6 Ch. D. 303).

A., becoming an underwriting member of Lloyd's, agreed in writing with B., his father, that in consideration of B making the necessary deposit, and giving the necessary guarantee, he would engage a particular underwriting agent and pay to B. one-half the net profits.

Held: That no partnership existed between A. & B., the relationship being that of debtor and creditor.

- (e) 1870, *ex parte Delhasse* (7 Ch. D. 511).

M. & S. agreed to become partners with each other, and with D. upon certain conditions contained in the partnership agreement, which set out the provisions of the first section of Bovill's Act, and contained as a recital a memorandum that M. & S. had requested D. to lend them £10,000 for the purposes of business, and that the advance was not to be considered to make him a partner.

Amongst the various stipulations was one that M. & S. were not to be personally liable to D. for the £10,000 which was the whole capital of the business.

Held: That D. was a partner with M. & S.

- (f) 1884, *Walker v. Hirsch* (27 Ch. D. 460).

H. & B. entered into an agreement with W., whereby for the part taken in the business it was agreed that W. should receive a fixed salary of £180, and in addition should receive one-eighth share of net profits, and bear one-eighth share of the losses as shown by the books when balanced; and W. agreed to advance £1,500 to the business. The agreement was to be determined by four months' notice on either side.

W. had previously been a clerk, and continued to perform similar duties after the execution of the agreement, and did not sign the name of the firm on bills.

The defendants H. & B. being dissatisfied, gave the plaintiff W. notice to determine the agreement, and excluded him from the place of business. The plaintiff applied to the Court for winding-up the partnership, and moved for an injunction and Receiver. The motion was refused on the defendants paying £1,500 into Court, and this was confirmed by the Court of Appeal, who decided that plaintiff was in the position of a servant, and that no partnership existed.

§ 9.—The desirability of a Written Agreement.

Although it is not legally necessary that a contract of partnership should be entered into by deed or in writing, it is always advisable that upon entering

into such a contract the parties should have a written agreement as to the conditions of the partnership, and the terms upon which it is to be conducted. In the first place, this puts on record the intention of the parties to create a partnership, and prevents a merely verbal arrangement being subsequently repudiated; and in the second place, it provides for such modification of the general law of partnership affecting the relations of the parties *inter se* as the parties may desire to introduce into the agreement, particularly in regard to the position arising on the death or retirement of a partner.

The most usual practice is to execute a formal deed of partnership, the terms of which may be varied by a further deed, or by another form of agreement, made either in express terms or to be implied from a course of dealing; but the original agreement, or any variation of it, should at any rate be reduced to writing, in order that the intentions of the parties to it may be declared in a clear and permanent form.

Where the partnership is not to be commenced within a year of the agreement, or a term of more than one year is agreed upon and nothing has been done under the agreement, the agreement cannot be enforced in the absence of a written memorandum to comply with Section 4 of the Statute of Frauds.

§ 10.—Important Clauses in Partnership Agreements.

The following are the headings of some of the more important clauses in partnership agreements : —

- (a) The nature of the business.
- (b) The duration of the partnership.

- (c) The capital and property of the firm, and the capitals of the individual partners.
- (d) The division of profits and losses between the partners, including capital profits and losses.
- (e) Whether interest on capital or drawings, or both, is to be charged, and the rate thereof, and whether partners' salaries are to be charged.
- (f) The rules as to partners' drawings.
- (g) Provision for proper accounts to be kept and taken, and for such accounts to be duly audited.
- (h) Stipulations as to the conduct and powers of the individual partners.
- (i) The method of determining the goodwill in the event of the retirement or death of any of the partners.
- (j) The method by which the amount due to a deceased or retiring partner is to be repaid.
- (k) The grounds upon which the partnership may be dissolved.
- (l) The power of expulsion.
- (m) Arbitration clause.

§ 11. Third Parties and the Partnership Agreement.

It is important to determine when third parties are bound by the partnership agreement, and perhaps it is sufficient to say that this is only the case generally where such third parties have notice thereof. It must be borne in mind, however, that if a restriction is placed upon the authority of a partner, knowledge of it will prevent a third party from holding the firm

bound when that partner has entered into transactions with him, in contravention of that restriction of authority (Sections 5 and 8).

The terms of the partnership agreement will also be binding upon the legal personal representative of a deceased partner, since he cannot acquire rights greater than the deceased himself possessed, and such representative will also be bound by any variation of such agreement, even if such variation is merely based upon a course of dealing (*Coventry v. Barclay* (1864), 3 D. J. & S. 320).

CHAPTER X
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CHAPTER X PARTNERSHIP

PART II

THE LIABILITY OF PARTNERS

§ 1.—Debts and Contracts.

Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner: and after his death his estate is also severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied, but subject in England or Northern Ireland to the prior payment of his separate debts (Section 9).

It must not be supposed that because the liability is joint the extent of each partner's liability is in any way affected; each partner is individually liable, subject to the restricted liability of a limited partner, for the whole amount due by the firm, and it is only the nature of the liability and the nature of the remedy which are in question.

The term "joint" in this connection means that in respect of debts and obligations arising from contract, the plaintiff can only bring one action and not several actions against the members of the firm since there is only one contract. He is not bound to join all the members of the firm in the action, but if he does not do so, he loses his rights against those whom he has omitted. The Court may, however, at the instance of the defendant, order the omitted members of the firm to be added as co-defendants if they are within the jurisdiction. The defendant also has a right to claim that other joint debtors, if within the jurisdiction, shall be joined as co-defendants.

It will be seen from Section 9 that the estate of a deceased partner is severally liable for debts and contracts of a firm; so that the fact that judgment has been recovered against members of a firm, but not satisfied, does not prevent the bringing of an action against the estate of the deceased partner who had not been joined in the original action, nor does the fact that the estate of a deceased partner has been sued prevent an action being brought against the surviving partners.

The importance of bearing in mind that the liability for debts and contracts is joint only, is owing to the fact that a judgment obtained against one partner is a bar to a subsequent action for the *same* debt or contract against other parties also liable (*Kendall v. Hamilton* (1879), 4 App. Ca. 504). If the liability had been joint and several (and this would only occur where the partners by special contract assumed a joint and several liability), although a joint judgment against all the parties liable would have extinguished the separate liability of each, yet a judgment recovered against one only would not extinguish the separate liability of others—for this there must be judgment and satisfaction (*Lechmere v. Fletcher*, 1 C. & M. 623).

Although judgment against one partner, when the liability is joint, even though it remains unsatisfied, is a bar to further action on the same cause, there will sometimes be another distinct cause upon which a further action may be taken against another partner. Thus, where a cheque or bill has been given in payment of a partnership liability, judgment obtained against one partner on the instrument is no bar to an action against the other partners *on the original contract*, for there are

two rights of action in such a case, one on the contract, and one on the instrument (*Wegg-Prosser v. Evans* (1895), 1 Q.B. 108).

Partners differ from ordinary joint debtors in the following respects :—

- (1) The estate of a deceased partner is severally liable for the debts of the firm ; whereas the estate of an ordinary joint debtor does not become severally liable, and if therefore judgment has been recovered against one joint debtor during the lifetime of another, the estate of this other could not be sued after his death.
- (2) Since each partner is an agent for the others in all matters relating to the firm's transactions, part payment or acknowledgment by one partner in respect of a joint debt will prevent that debt from becoming statute-barred, or will revive it as against the others. This is not so with ordinary joint debtors, since in this case there is no question of agency.

§ 2.—Torts.

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act (Section 10).

In the following cases Section 11 of the Act specifically provides that the firm is liable to make good the loss where—

- (a) One partner acting *within the scope of his apparent authority* receives the money or property of a third person and misapplies it ; and
- (b) A firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm.

Every partner is liable jointly with his co-partners, and also severally, for everything for which the firm, while he is a partner therein, becomes liable under either Sections 10 or 11 (Section 12).

The meaning of joint and several liability as affecting torts, is that if the plaintiff recovers judgment against one partner, this shall not be a bar to an action against another partner, provided that the plaintiff cannot recover in total more than the amount of the damages awarded by the judgment first given (Law Reform (Married Women and Tortfeasors) Act, 1935, Section 6). The rule in *Brinsmead v. Harrison* ((1872), 27 L.T. 99) where it was decided that a joint and several obligation arising *ex delicto* is extinguished by a judgment recovered against one of the parties liable even without satisfaction no longer applies, it now being possible for a plaintiff to obtain judgment against each partner of a firm in turn until satisfaction has been obtained. The distinction between the joint and several liability arising out of tort, and that arising out of contract, should be carefully noted.

Breaches of trust involve a joint and several liability, each partner remaining severally liable until the judgment has been satisfied (*Blyth v. Fladgate* (1891), 1 Ch. 353). A joint judgment in such cases would

entitle the party injured to prove in the bankruptcy of the judgment debtors against each of their separate estates (*Drake v. Mitchell*, 3 East 251).

An example of a tort under Section 10 is the case of a partner bribing a clerk in a competing firm to obtain a list of that firm's customers (*Hamlyn v. John Houston & Co.* (1903), 19 T.L.R. 66).

Section 11, which has been quoted above, declares under what circumstances the firm is liable for misapplication of money or property received for, or in the custody of the firm.

It will be noted that where one partner both receives and misapplies the money or property, he must, for the firm to be liable, receive it whilst acting within the scope of his apparent authority; thus, if a partner in a firm of solicitors receives money from a client to be invested in a specific security, and misappropriates it, the remaining partners are responsible for the loss, since to invest money in specified investments is within the ordinary scope of a solicitor's business (*Blair v. Bromley* (1847), 2 Ph. 354); but this would not be the case if the money had been given to the defaulting partner with a mere direction to invest it at his discretion (*Harman v. Johnson* (1853), 2 E. & B. 61).

The firm, however, is always liable to make good a loss where it has become answerable for the money or property of a third person, and the same has been misappropriated by one or more of the partners whilst in the custody of the firm (*Blair v. Bromley, supra*).

§ 3.—Trust Money improperly Employed in the Partnership.

If a partner, being a trustee, improperly employs trust property in the business or on the account of

the partnership, no other partner is liable for the trust property to the persons beneficially interested therein (Section 13).

This section does not, however, affect any liability incurred by any partner by reason of his having notice of a breach of trust; and does not prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

It will thus be seen that a partner is not liable for property employed in the business as involving a breach of trust, unless he is himself the person responsible for the breach, or has received notice of such breach; and since one partner is very frequently in ignorance of the private affairs of another, and could not be expected to know from what sources property or moneys introduced by that other were derived, it is only fair that, in the case of wrongdoing, he should not be saddled with any of the consequences unless he can be shown to have had a guilty knowledge. Any such property or money, however, if it can be identified, may be followed and recovered if still under the control of the firm.

§ 4.-Extent of the Partnership Agency.

Every partner is an agent of the firm, and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority,

or does not know or believe him to be a partner (Section 5).

It will be observed that where a limitation has been placed upon the authority of a partner by the other partners, and such limitation is known to third parties, they cannot regard such partner as acting for the firm in a matter falling within the operation of such limitation. It cannot be too strongly borne in mind that the agency of each partner only relates to matters connected with the partnership business, and falling within the apparent scope of the partnership business.

In a similar manner the firm is not bound by the act of one of the partners where such partner had no authority to act for the firm in the particular matter, and the person with whom he was dealing did not know or believe him to be a partner.

Section 8 provides that if it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

A firm is not presumed to be the agent of a partner and, therefore, payment to the firm of a debt due to a partner does not discharge the debt without proof that the firm had power to receive payment (*Powell v. Brodhurst* (1901), 2 Ch. 160).

§ 5.—Implied Authority of Partners.

The greatest difficulty in dealing with the implied authority of partners is to determine what is necessary for the usual conduct of the partnership business ;

since, as has been pointed out, it is only in respect of such matters that the implied authority of a partner arises.

In the absence of any express limitation, every partner may bind the firm in the following matters :—

- (a) Selling any goods of the firm (*Dore v. Wilkinson* (1817), 2 Stark 287).
- (b) Purchasing goods on behalf the firm, if they are of a kind necessary for or usually employed in the business (*Bond v. Gibson* (1808), 1 Camp. N.P. 185).
- (c) Receiving payment of debts due to the firm and giving receipts (*Porter v. Taylor* (1817), 6 M. & S. 156).
- (d) Engaging servants for the partnership business (*Beckham v. Drake* (1841), 9 M. & W. 79), and probably in discharging them if the other partners raise no objection.

And if it is a trading partnership a partner may also bind the firm in the following matters :—

- (e) Drawing, accepting, or indorsing bills and other negotiable instruments in the name of the firm (*Chalmers on Bills of Exchange*, 10th Ed., p. 81).
- (f) Borrowing money on the credit of the firm (*Lane v. Williams* (1692), 2 Vern. 277).
- (g) Pledging goods or personal chattels belonging to the firm (*ex p. Bonbonus* (1803), 8 Ves. 540).
- (h) Making an equitable mortgage by deposit of deeds or otherwise of real property belonging to the firm (*re Bourne* (1906), 2 Ch. 427-430).
- (j) A managing partner has implied power to employ a solicitor to defend an action against the

firm for goods supplied (*Tomlinson v. Broadsmith* (1896), 12 Q.B. 386), and to retain a solicitor to bring an action in the firm-name (*Court v. Berlin* (1897), 22 Q.B. 396).

Professional partnerships, *e.g.*, accountants, agricultural partnerships and mining partnerships have been held to be non-trading partnerships as also have been partnerships carried on by commission agents and cinema proprietors. A banking partnership is a trading partnership (*Bank of Australasia v. Breillat* (1847), 6 Moore, P.C. 152).

It should be observed, however, that one partner has no implied authority to bind the firm by the execution of a deed (*Harrison v. Jackson* (1797), 7 T.R. 207), or by a submission to arbitration (*Stead v. Sall* (1825), 3 Bing. 101), or by giving a guarantee; but if the giving of a guarantee is usual in the particular firm, or in a particular trade, the firm might be bound in such a case (*Brettel v. Williams* (1849), 4 Ex. 623). Neither has a partner implied authority to accept shares in satisfaction of a debt due to the firm, even though such shares were fully paid (*Niemann v. Niemann* (1889), 43 Ch. 198).

Authority to execute a deed must itself be given under seal; and the fact that the partnership agreement is in the form of a deed is not of itself sufficient (*Marchant v. Morton Down & Co.* (1901), 2 K.B. 829); but if one partner executes a deed in the presence of the other partners in their name and with their consent, this will be binding upon them (*Ball v. Dunsterville* (1791), 2 R.F. 394).

A partner submitting to Arbitration without the assent of the others will himself be bound, though the other partners are not; but the others may become bound by acquiescence.

§ 6. Acts in relation to the Business of the Firm.

An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners (Section 6).

This section does not, however, affect any general rule of law relating to the execution of deeds or negotiable instruments.

§ 7. Pledging the Firm's Credit.

Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless the partner was in fact specially authorised by the other partners (Section 7). This section does not affect any personal liability incurred by an individual partner.

In connection with Section 7 it should be noted that where a person takes partnership property from a partner, in discharge of a separate claim, knowing it to be such, he takes such property at his own risk (*Kendall v. Wood*, (1871), L.R. 6 Ex. 248): unless he can shew that he had reasonable grounds for believing that the remaining partners had authorised the particular partner concerned so to deal with the firm property.

§ 8.—Admissions and Representations.

Under Section 15 of the Act, an admission or representation made by a partner concerning the partnership affairs, and in the ordinary course of business, is

evidence against the firm. This section has, however, no application to a representation made by a partner as to the extent of his own authority to bind the firm (*ex parte Agace* (1792), 2 Cox, 312).

§ 9.—Notice to a Partner operating as Notice to the Firm.

Section 16 provides that notice to any partner, who habitually acts in the partnership business, of any matter relating to partnership affairs, operates as notice to the firm; except in the case of a fraud on the firm committed by or with the consent of that partner.

It is doubtful whether notice would be deemed to have been received by the firm where it was given to a person before he became a partner in the firm.

Notice of dishonour of a bill of exchange given to a continuing partner is sufficient notice to a retired partner—though the latter may not necessarily be liable upon the bill (*Goldfarb v. Bartlett & Kremer* (1920), 1 K.B. 639).

§ 10.—Incoming and Outgoing Partners.

(a) Liability for debts contracted before becoming a partner.

When a person is admitted into an existing partnership, he will immediately assume the liability of a partner. By Section 17 (1) of the Act, however, a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner. He would, however, be liable in respect of new debts arising out of a continuing contract made by the firm before he became a partner.

An incoming partner may, however, become liable for antecedent debts by an agreement to that effect with creditors, either by deed, or for valuable consideration, or by novation.

(b) Liability for debts incurred before retirement.

Where a partner in a firm retires from the partnership, he will still be liable for debts and obligations incurred before his retirement (Section 17 (2)).

(c) Novation.

By Section 17 (3) of the Act, however, a retiring partner may free himself from existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted, and the creditors.

This agreement may be either expressed or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Such an agreement is known as a **Contract of Novation**, and is a substitution of liability requiring three parties—an old debtor, a new debtor, and a creditor. By the terms of the agreement the creditor agrees to release the old debtor, and accept in his place the liability of the new debtor. A new agreement between the partners themselves, without the consent of the creditor, will be of no effect. As the creditor would be a stranger to such an agreement, he could acquire no rights thereunder.

In partnership cases this novation usually takes place where, on the retirement of one partner, a new partner is introduced; notice of the change, and of the fact that the new firm takes over the liabilities of the old firm is given to the creditors, and they either expressly or impliedly assent.

It is often most important to ascertain in such cases whether the retiring partner has in fact been discharged from the old liabilities. Lord Lindley gives certain simple rules which must be borne in mind when considering a question of this kind :—

- (1) There is no presumption that the creditors of a firm do, on the retirement of a partner, enter into an agreement to discharge him from liability.
- (2) An agreement by a creditor of several persons, liable to him jointly, to discharge one of them, and look only to the others, is not necessarily invalid for want of consideration.
- (3) Except in special circumstances, a creditor who releases one partner discharges all. Consequently if a creditor discharges a retiring partner, and acquires no fresh right to obtain payment from the others, either alone or with a new partner, the creditor will be altogether without remedy. One test, therefore, to determine whether a retired partner has been discharged is to see whether the creditor has obtained a new right to demand payment; for if he has not, no discharge can possibly be made out by any evidence which fails to establish the extinguishment of the creditor's demand altogether.

Two classes of cases have to be considered :—

- (1) Where no new partner has been introduced into the firm.
- (2) Where a new partner has been introduced.

In the former of these classes the cases of *Lodge v. Dicas* (3 B. & Ald. 611), and *David v. Ellice* (5 B. & C. 196), are instances in which, on the retirement of

one member of a partnership, the remaining partners who continued the business agreed to pay the debts of the old firm. Notice of this arrangement was given to the creditors, and with their consent the debts owing to them were transferred to the books of the new firm. In each case it was held that the retired partner continued liable, and that the plaintiff had done nothing to discharge him; and the fact that no person had become liable to the plaintiff, who was not so originally, was relied upon by the Court as showing that there was no consideration for the alleged discharge.

Against this may be set the case of *Thompson v. Percival* (5 B. & Ad. 925). In this case two partners were indebted to the plaintiff. The partnership was dissolved, and it was agreed that the partner carrying on the business should receive and pay all debts. The plaintiff in this case, on applying to the continuing partner for payment, was told that he must look to him alone for payment. The plaintiff accordingly drew a bill on the continuing partner, which was accepted by him, and was afterwards dishonoured. He then sued both partners for the original debt, and it was ultimately held that the retired partner had been discharged by accord and satisfaction, since the creditor had secured a new right of action on the bill.

Lord Lindley appears to look upon this as supporting his contention that consideration is not necessary to the contract of novation; but it is submitted that this view is incorrect, and that all the cases quoted by him, in support thereof, may be better explained either by the doctrine of *estoppel*, or on the grounds of accord and satisfaction.

In the second class of cases, where a new partner has been introduced, and the creditors have had notice of the fact, the main point to be looked at is whether the creditor has, with full knowledge of the facts, accepted the liability of the new firm in place of that of the old firm ; if he has not done so, no agreement between the old partners can bind him. It will be strong evidence that this is the case, if, knowing of the facts, the creditor has continued to deal with the new firm without objection, and without reserving his rights against the retiring partner.

The question of the release of the estate of a deceased partner by continued dealings with the other partners, stands on much the same footing, that is to say, there must be evidence of intention on the part of the creditor to release the estate. But if, knowing of the death, the creditor takes no steps to obtain payment from the estate of the deceased, but stands by and allows it to be administered as if he had no claim on it, and continues dealing with the existing partners, he can look to them only for payment.

Since the intention of the creditor is essential to the novation, a creditor cannot by any course of dealing release a debtor of whose existence he was unaware ; therefore, if a dormant partner retires, the fact that the creditor continues to deal with the new firm cannot release the dormant partner or his estate.

(d) Notice of retirement.

A retiring partner will also continue to be liable for the debts of the firm, even if contracted after his retirement, unless proper notice is given of the dissolution of the partnership. By section 36 of the Act it is provided that :---

(1) Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2) An advertisement in the *London Gazette* as to a firm whose principal place of business is in England or Wales, in the *Edinburgh Gazette* as to a firm whose principal place of business is in Scotland, and in the *Dublin Gazette* as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

[In the case of Northern Ireland the *Belfast Gazette* now takes the place of the *Dublin Gazette*.]

(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is *not* liable for partnership debts contracted *after* the date of the death, bankruptcy, or retirement respectively.

It will be observed that, so far as persons are concerned who have had no dealings with the firm prior to the date of dissolution, notice in the *Gazette* is sufficient, but in order to avoid further liability to persons who have had dealings with the firm, it is necessary to give them *specific* notice. Although public notice of his retirement is given, a former partner will remain liable on subsequent contracts made by the firm with old customers who have, in fact, had no notice of his retirement (*Pillani v. Motilal*, 45 T.L.R. 283 P.C.).

(e) Notification of dissolution.

Section 37 of the Act gives any partner the right to notify dissolution, and he may require the other

partners to concur for that purpose in necessary and proper acts (if any) which cannot be done without their concurrence. For this purpose a retiring partner must sign a notice of dissolution for insertion in the *Gazette*, and if he refuses can be ordered to do so by the Court (*Hendry v. Turner* (1886), 32 Ch. D. 355).

§ 11.—Guarantees.

Section 18 of the Act provides that a *continuing* guarantee given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guarantee or obligation was given. Such a guarantee is not revoked by a change in the constitution of the firm by whom it is given.

§ 12.—Holding Out.

Third parties may become liable for the debts and liabilities of the firm as a consequence of "holding out." It is provided by Section 14 of the Act, that : —

(1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

(2) Provided that where after a partner's death the partnership business is continued in the old

firm name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executor's or administrator's estate or effects liable for any partnership debts contracted after his death.

It should be particularly noted that holding out may take place by words written or spoken, or by conduct, *e.g.*, a man may state in writing that he is a partner, or may say he is a partner, or may stand by and hear someone else say it without offering any repudiation, and in doing any of these things he will be liable for any credit given by third parties upon the strength of his actions. It is not necessary that the credit has been given by the person to whom the representation was made; it is sufficient that credit was given on the facts represented and communicated to the creditor. The person to be held liable may not even have been aware that the facts were communicated to the party giving credit. Although a person may have been held out as a partner, he is not liable to persons giving credit to the firm who were unaware of such holding out. It is not essential that the person held out as a partner shall be named specifically so long as he is described in such a manner as leaves no doubt as to his identity (*Martyn v. Gray* (1863), 14 C.B.N.S. 824).

This rule as to holding out is a special application of the doctrine of estoppel. Estoppel is a rule of evidence under which if one person has induced another, by words or conduct, to assume the existence of a certain state of facts, and to act accordingly, he is stopped from denying the existence of such facts.

It is important to observe that the continued use of a deceased partner's name in the style of a firm does not of itself make the legal personal representative liable for the debts of the firm contracted since his death, under the rule of holding out ; and this is so, whether creditors of the firm know of his death or not.

The importance of a retiring partner giving notice of retirement has already been referred to. If he fails to give proper notice, he may become liable for debts contracted by the firm after his retirement under the rule of holding out ; but this will only be to those creditors who actually give credit in the belief that he is a partner (*Carter v. Whalley* (1830), 1 B. & Ad. 11).

CHAPTER X PARTNERSHIP

SYNOPSIS OF PART III

THE RIGHTS AND DUTIES OF PARTNERS

§ 1.—THE RIGHTS OF PARTNERS.

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CHAPTER X

PARTNERSHIP

PART III

THE RIGHTS AND DUTIES OF PARTNERS

§ 1.-- The Rights of Partners.

In considering the rights of partners, it is only necessary to deal with their rights *inter se*, since the rights of partners against third parties do not generally arise under the law peculiar to partnership, but rather under the general law relating to contract or tort.

§ 2.- Firm Name.

There is one important matter, however, in respect of which the rights of the partners against third parties must be considered, and that is with regard to the Firm Name. It will be remembered that two limited companies cannot be registered with identical names (Companies Act, 1929, § 17); but there is nothing to prevent any number of firms carrying on business under the same names, and this, even though the partners may not themselves bear the names contained in the firm name. But a firm name will be protected by the Court when a similar name is assumed by another person in such a way as to induce persons to deal with him, in the belief that they are dealing with the person who has given a reputation to the name (*Lee v. Haley* (1869), L.R. 5 Ch. 161); and the name of a foreign firm which has a British connection but no place of business in this country, will even be protected in these circumstances (*Poiret v. Jules Poiret, Ltd., and Nash*, 37 R.P.C. 177).

A well known case is that of Day & Martin, the manufacturers of blacking. In this case the plaintiffs had acquired their rights from the original firm, and though there was no longer a Day or a Martin in the firm they were able to get an injunction restraining persons with those names from trading as blacking manufacturers under the name of Day & Martin (*Croft v. Day* (1843), 7 Beav. 84).

The name, however, will only be protected when such a fraudulent intent can be shown, and the distinction between Trade Names and Trade Marks upon this point is important; since there is a distinct property in a Trade Mark, which the Courts will always protect.

When a firm is carried on under a name which does not consist of the true surnames of *all* the partners, with no addition thereto (other than Christian names or initials) it must be registered under the Registration of Business Names Act, 1916. When a corporation is a partner the firm name must contain the corporate name if registration is to be avoided.

Registration must also be effected when a partner has changed his name, except in the case of a female partner when the change of name is caused by marriage.

The registrar must be furnished with the following information: —

- (a) The business name.
- (b) The general nature of the business.
- (c) The principal place of business.
- (d) The present Christian name and surname, any former Christian name or surname, the nationality, and if that nationality is not the nationality of

origin, the nationality of origin, the usual residence and the other business occupation (if any) of each of the individuals who are partners, and the corporate name and registered or principal office of every corporation which is a partner. .

(c) The date of commencement of business.

Failure to register a firm required to be registered under the Act has very serious consequences. The rights of the defaulting firm under any contract into which it has entered during the period of default are unenforceable by action or other legal proceeding. Such contracts are, however, enforceable against the firm by the other parties thereto. In certain cases, however, the court will grant relief to the defaulter, *e.g.*, when failure to register was accidental, due to inadvertence or some other sufficient cause, or in any case where it is just and equitable that relief should be granted.

In addition to providing the registrar with the information set out above, every firm required to be registered must disclose in legible characters the full names and any former names of the partners on all trade catalogues, trade circulars, show-cards and business letters, on or in which the business name appears and sent to any person in any part of the British Dominions. If any partner is not of British birth, his nationality must also be given, and similarly when a partner's nationality is not his nationality of origin, the latter must also be disclosed.

The Act is reproduced in full in the Appendix.

§ 3.—Variation of Terms of Partnership.

As between themselves, partners can enter into any agreement they choose, and to this extent may

render many provisions of the Act inapplicable, but they cannot by agreement *inter se* affect the rights of third parties, unless those third parties actually contract to be bound by such agreement.

The terms of the agreement into which partners enter may, with the consent of *all* the partners, be varied at any time. The consent of the partners to the variation may be express or inferred from a course of dealing (Section 19).

It is possible, therefore, by a course of dealing to vary a written contract or deed, and if this is done without dissent by any of the partners, such course of dealing becomes binding upon all parties. These variations frequently take place in respect of such matters as capital, interest on capital, drawings and salaries; and where a particular method is prescribed by the partnership agreement for valuation of partnership property for the purpose of the accounts, but a different method is consistently adopted with the consent of the partners, the accounts so taken are binding upon them, and upon their legal personal representatives or assignees (*Coventry v. Barclay* (1864), 3 D. J. & S. 320).

§ 4. - Rules as to the Rights and Duties of Partners in the absence of Agreement.

In the absence of any agreement to the contrary, the following rules as to the interests, rights, and duties of partners in relation to the partnership will apply :—

- (1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm.

- (2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—
 - (a) In the ordinary and proper conduct of the business of the firm; or
 - (b) In or about anything necessarily done for the preservation of the business or property of the firm.
- (3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.
- (4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.
- (5) Every partner may take part in the management of the partnership business.
- (6) No partner shall be entitled to remuneration for acting in the partnership business.
- (7) No person may be introduced as a partner without the consent of all existing partners.
- (8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.
- (9) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them (Section 24).

The provisions of Section 24 are extremely clear, but the importance of them cannot be overstated. Like most of the other sections of the Act, it applies only where partners have not entered into any agreement either express or implied to the contrary. It will be observed that, in the absence of such agreement, there is a presumed equality both so far as the introduction of capital is concerned, and also in respect of the proportions in which profits and losses are to be shared.

Although it is usual (and in fact very desirable where the capitals differ) to charge interest on capital before ascertaining profits, yet in the absence of any agreement to do this, a partner is not entitled to interest upon his capital; but if he makes an advance to the business, in excess of the capital which he has agreed to bring in, he will be entitled to 5 per cent. per annum thereon, unless there is an agreement whereby he shall receive some other rate. Interest on capital, even if agreed upon, ceases to be payable upon dissolution (*Watney v. Wells* (1867), 2 Ch. App. 250).

Although in practice it may happen that the management of the business is left in the hands of one of the partners, in the absence of any agreement to the contrary all the partners are entitled to take part in such management, except in the case of a *limited* partner. But no partner is entitled to any salary for so doing, though in actual practice salaries are often agreed upon by the partners.

It will be noted that a partner is entitled to be indemnified for payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business of the firm, or in or about anything

necessarily done for the preservation of the business or property of the firm ; but he is responsible for his own share of any such payments or liabilities, and the indemnity given to him is, therefore, not so complete as that given to an ordinary agent.

It must be remembered that a *limited* partner cannot with safety form one of a majority for the purpose of deciding differences arising as to ordinary partnership matters ; otherwise a majority of the partners can control the business to this extent, provided there is no agreement to the contrary.

Every partner has access to the books of the partnership and may inspect them and take copies either personally or through an agent, provided that such agent undertakes not to use the information obtained for any other purpose, and is not a person to whom the other partners can reasonably object (*Bryan v. Webb* (1901), 2 Ch. 59). A *limited* partner is given a statutory right to inspect the partnership books through the medium of an agent (Limited Partnerships Act, 1907, Section 6).

§ 5. -Expulsion of a Partner.

Unless the power to do so has been conferred by express agreement between the partners, no majority of the partners can expel any partner (Section 25).

Even where the partnership agreement provides that a majority of partners may expel a partner, the power must be exercised in good faith, and the court will always prevent such a power being exercised harshly or inequitably.

It will thus be seen that, subject to any agreement to the contrary, a majority of partners cannot—

- (a) Vary any agreement between the partners.
- (b) Admit a new partner.
- (c) Expel a partner.
- (d) Change the nature of the partnership business.

§ 6.—Partnership Property.

In considering the rights of the partners it is of great importance clearly to understand what is partnership property. Section 20 of the Act defines partnership property as follows : —

(1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purpose of the partnership and in accordance with the partnership agreement.

(2) Provided that the legal estate or interest in any land or in Scotland the title to and interest in any heritable estate which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as

co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

Property, as distinct from money, brought into the partnership and credited to the capital account of the partner so bringing it in, is partnership property, and if on dissolution it realises more than its book value, the profit thereon is divisible as profits of the business (*Robinson v. Ashton* (1875), L.R. 20, Eq. 25).

Property bought with partnership money is deemed to have been bought on account of the firm, unless a contrary intention appears (Section 21); and property purchased on account of the partnership, with partnership money, by one partner without the consent of the others, is also the property of the firm (*ex parte Hinds* (1849), 3 De G. & Sm. 603).

If a lease of a colliery is taken by a firm, and is worked by the firm, such lease is partnership property; but the fact that co-owners of a colliery work it in partnership, does not make it partnership property (*Lindley*, 9th edition, 420).

If property is purchased with the firm's money for the benefit of one partner, and his account is debited with the cost, such property does not belong to the partnership, but to the partner so charged therewith (*Smith v. Smith* (1800), 5 Ves. 189).

§ 7. – Character of Partnership Property.

Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased

partner and his executors or administrators, as personal or movable and not real or heritable estate (Section 22).

This point was of considerable importance prior to 1926, since if title to land which was partnership property was in one of the partners only, it would, upon his death intestate, have devolved upon his heir-at-law, who would have been regarded as a trustee in respect thereof for the partnership. Since 1st January, 1926, realty and personalty are assimilated for the purpose of distribution of an intestate's estate, and if such land passed to the personal representative of the deceased partner, it would be held in trust, pending the determination of the share of the partnership property to which the deceased partner's estate would be entitled.

§ 8.-- Goodwill.

An important asset comprised in the term partnership property is goodwill. The saleable value of this is always partnership property, in the absence of any stipulation to the contrary in the partnership agreement.

By Section 35 of the National Health Service Act, 1946, where the name of any medical practitioner is, on 5th July, 1948, or at any time thereafter, entered on any list of medical practitioners undertaking to provide general medical services under the Act, it is unlawful subsequently to sell the goodwill or any part of the goodwill of his medical practice. There is an exception to this provision where a medical practitioner takes his name off the list and practices elsewhere, and it will be observed that the prohibition has no application to a practitioner who does not enter the service under

the Act. Payments for taking into partnership and for retiring from partnership are similarly prohibited, except as regards options and obligations to purchase contained in a partnership agreement existing before 5th July, 1948. Compensation for loss of the right to sell medical practices will be paid to those practitioners who enter the service on 5th July, 1948.

§ 9.—Conversion of Partnership Property.

Partners may by agreement convert the property of the firm into the separate property of any partner, or *vice versa*. Such conversion, if made *bona fide* and before bankruptcy, is binding not only on the partners, but also upon the creditors concerned.

§ 10.—Execution on Partnership Property.

The property of the partnership may be taken in execution on a judgment *against the firm*, but not on a judgment against a separate partner (Section 23 (1)).

But the High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been in the favour

of the judgment creditor by the partner, or which the circumstances of the case may require (Section 23 (2)).

In the event of such an order being made, the other partner or partners will be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same (Section 23 (3)).

Section 23 applies in the case of a cost-book company* as if the company were a partnership within the meaning of the Act, but it does not apply to Scotland.

It will thus be seen that where a creditor obtains a judgment against a partner for his separate debt, and such partner has not separate property which can be taken in execution, such creditor cannot—as formerly—issue execution against the firm's property. His only remedy is to obtain a **Charging Order** upon the judgment debtor's share of the profits, and the appointment of a Receiver to take such share of profits till the debt is satisfied.

It should be observed that the other partner or partners are not only at liberty to redeem the interest charged, but, in the case of a sale being directed, to purchase it (Section 23 (3)).

The charging of a partner's share is also ground for dissolution at the option of the other partners (Section 33 (2)), except where the judgment debtor is a *limited* partner (Limited Partnerships Act, 1907, Section 6 (5c)).

* A cost-book company is a mining company operating in Devon and Cornwall under the jurisdiction of the Stanneries Acts, 1869-1896. These companies are a species of partnership, the business thereof being conducted by an individual called a "purser."

§ 11.—Involuntary Assignments.

The creditors of the separate partners have no rights against the firm property. It has already been pointed out that execution cannot be levied on the firm property, except on a judgment against the firm ; but it is desirable to deal more particularly here with the alternative right of the separate creditors.

When judgment has been obtained against a partner for his separate debt, the judgment creditor may, of course, enforce the judgment by execution upon the separate property ; but where there is no property which can be taken in execution, the only remedy against the property of the firm is to obtain from the King's Bench Division of the High Court, or a County Court, an Order charging that partner's interest in the partnership property and profits with the payment of the judgment debt and interest thereon, and the appointment of a Receiver of such profits or money coming to him in respect of the partnership. Such an involuntary assignment does not give the judgment creditor the right to accounts from the firm. The position of the other partners, in such a case, has already been dealt with.

A judgment creditor obtaining a Charging Order on a partner's share for his separate debt, cannot obtain any rights greater than those acquired by an absolute assignee, but is presumably in no worse position.

§ 12.—Express Assignments.

A partner cannot introduce another partner into the business, in substitution for himself, without the consent of all the other partners ; but there is nothing to prevent him mortgaging or assigning his share to a

third party, who would then acquire a right to payment of what, upon taking the accounts of the partnership, might be due to the partner so mortgaging or assigning.

By Section 31 of the Act :—

(1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

The assignee is bound by any *bonâ fide* agreement entered into subsequently by the partners, even an agreement to charge salaries in respect of services rendered by the partners to the firm (*in re Garwood's Trusts* (1903), 1 Ch. 236).

§ 13.—Partnership at Will.

In the ordinary course a partnership is entered into for a fixed term, and can only be dissolved before

the expiration of that term by agreement, or the fulfilment of certain conditions ; but where a partnership has not been entered into for a fixed term, it is a **Partnership at Will**, and a partner may retire from it at any time by giving notice of his intention so to do to all the other partners.

It should be particularly noticed that where the partnership was constituted by deed it may be determined by notice in writing to all the other partners, signed by the partner giving it, and such notice need not itself be under seal. But in *Moss v. Elphick* ((1910), 1 K.B. 846) it was decided that where a partnership is formed by deed, no term being named, but dissolution to be by mutual assent, one partner cannot give notice to dissolve ; the assent of the other partners is necessary in such a case.

§ 14.—Partnership Continued after Expiration of Term.

Where a partnership has been entered into for a fixed term and such term has expired, but the partnership is continued, it is presumed, subject to any express new agreement, that the rights and duties of the partners remain the same as they were at the expiration of the term, so far as this is consistent with the incidents of a partnership at will.

A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership (Section 27).

The words “ so far as is consistent with the incidents of a partnership at will,” which are embodied in the text of Section 27, are important, since any clause in

the original partnership agreement, which would not be consistent with a partnership at will, will cease to operate. Thus, if the agreement provides that a partner wishing to retire shall give notice within a prescribed time of the date when he intends to do so, this is perfectly good during the term of the partnership, but is not consistent with a partnership at will, and therefore ceases to operate after the expiration of the original term (*Featherstonhaugh v. Fenwick* (1810), 17 Ves. 307).

On the other hand, the arbitration clause inserted in a partnership agreement for a short term will hold good if the partnership is continued after such term has expired (*Gillett v. Thornton* (1875), L.R. 19 Eq. 599).

§ 15. Arbitration Clause in a Partnership Agreement.

The effect of the usual arbitration clause in the partnership agreement, is to give the partners a right of settlement of differences by arbitration; and the Court can, in proper circumstances, stay any action brought in respect of the subject matter of the arbitration clause, and thus cause the matter to be referred to an arbitrator in accordance with the original agreement between the partners.

If the clause is a general submission of all matters in difference between the partners, the arbitrator may—

- (1) Dissolve the partnership.
- (2) Order one partner to pay or give security for the payment of a certain sum to another.
- (3) Apportion the assets.
- (4) Order conveyances to be executed.

- (5) Direct one partner to sue in the name of himself and others.
- (6) Restrain one partner from carrying on business within certain limits.
- (7) Direct mutual releases.
- (8) Award a return of all or part of a premium.

The Arbitrator cannot appoint a Receiver or direct payment of a sum of money to himself, to be applied in discharge of specific debts. He can, if the arbitration clause is sufficiently wide, order dissolution and award a return of the premium, or a part thereof (*Belfield v. Bourne* (1894), 1 (Ch. 521).

If, after dissolution, the mortgagee of the share of one of the partners brings an action for an account, the other partners cannot have the action stayed, on the ground that the matters in dispute are covered by an arbitration clause, since such a clause is not binding on a mortgagee (*Bonnin v. Neame* (1910), 1 (Ch. 732).

§ 16.—The Duties of Partners.

(a) To act in good faith.

The primary duty of a person who has entered into the contract of partnership is to perform his part of the contract. Whatever he may have agreed to at the time of entering into partnership is binding upon him, so far as the other partners are concerned, and this, whether the matter concerned is to their advantage or otherwise.

Inseparably connected with his duty under the contract of partnership is the important element of good faith; this should, of course, be present in all contracts, but in partnership we have a contract falling into the class known as *uberrimae fidei*, and

the Court will always require the utmost good faith to be shown by every member of the firm to every other member. It will thus be clear from this that a partner must not, at the expense of his co-partners, obtain a secret advantage. He must do his best for the firm business, and must render to his partners their proper share in all benefits which he may have been able to obtain from other people in respect of partnership transactions.

The Court will never order specific performance of an agreement to enter into partnership, as it would be impossible to enforce the good faith necessary to such a contract. Damages only could therefore be obtained in the event of the breach of such an agreement.

(b) To render accounts and information.

Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives (Section 28).

(c) To account for private profits derived through the partnership.

Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connexion (Section 29).

The above section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up either by any surviving partner or by the representatives of the deceased partner.

(d) Not to compete with the firm.

If a partner, without the consent of the other partners, carries on any business of the same nature

as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business (Section 30).

It will thus be seen that partners are bound to render accounts and information of all matters affecting the partnership to any other partner or his legal representative; and that they must account to the firm for all profits made from partnership transactions or use of the partnership property or name, without the sanction of the other partners; whilst a partner is also prohibited, unless he has the sanction of his co-partners, from carrying on a competing business.

It will be appreciated that although a partner is liable to pay over to his firm the profits of any competing business in which he is engaged, his firm will not be responsible for any losses made by such business.

Where a competing business is carried on with the consent of the other partners, it must be carried on strictly in accordance with the terms of the consent given, so that if any limitations are imposed they must be complied with. It should be borne in mind that Section 30 does not apply to businesses carried on which are not of a nature *competitive* with the actual partnership business; in any such case the person so carrying on the business is personally entitled to the profits he makes (*As v. Benham* (1891), 2 Ch. 244; *Dean v. MacDowell* (1877), 8 Ch. D. 345). A partner may, therefore, be a member of another firm engaged in the same trade so long as there is no question of competition between the two firms (*Trimble v. Goldberg* (1906), A.C. 494).

CHAPTER X
PARTNERSHIP
SYNOPSIS OF PART IV
DISSOLUTION OF PARTNERSHIP

- 1.—DISSOLUTION OF PARTNERSHIP.
 - (a) By effluxion of time, termination of adventure or notice.
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CHAPTER X

PARTNERSHIP

PART IV

DISSOLUTION OF PARTNERSHIP

§ 1. Dissolution of Partnership.

In dealing with dissolutions it is important to remember that although the rights of third parties cannot be affected by any agreement between the partners, unless such third parties have themselves so contracted, partners may nevertheless effectually bind themselves by agreement as to the consequences of dissolution.

A partnership is only binding upon the members of a firm for the actual period for which it has been agreed that it shall continue, though it frequently goes on for a longer period by reason of a renewal for a further period, or by its continuance as a *partnership at will*.

It can, of course, always be dissolved by mutual agreement.

(a) By effluxion of time, termination of adventure, or notice.

Subject to any agreement between the partners, a partnership is dissolved—

- (i) If entered into for a fixed term, by the expiration of that term ;
- (ii) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking ;
- (iii) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or if no date is so mentioned as from the date of the communication of the notice (Section 32).

Where a partnership for a definite period has been continued after the expiration of that time, without further agreement, it becomes a *partnership at will*, and may be dissolved by notice.

If a *partnership at will* was constituted by deed, the notice to dissolve must be in writing (*see ante*, at p. 515).

(b) By death or bankruptcy.

Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner (Section 33 (1)).

A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under the Act for his separate debt (Section 33 (2)).

Mere insolvency is not of itself ground for dissolution, unless the partnership agreement so provides; but if a partner (other than a limited partner) allows his interest in the partnership to be charged as a result of his insolvency, the partnership may be dissolved at the option of the other partners.

(c) By illegality.

A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership (Section 34).

The question of illegal associations has already been mentioned (Chapter I, Section 5). It is necessary, however, to point out that Section 34 provides, not only for dissolution owing to the illegality of the business, but also on account of the illegality of it being carried on in partnership. Thus, if one partner of a firm resides in this country and the other resides and trades in a foreign country (even though the latter is an Englishman), the outbreak of war between England and the foreign country would automatically dissolve the partnership (*Rex v. Kupfer* (1915), 2 K.B. 321). The mere fact that a partner in a firm is the subject of a country with whom England is at war will not dissolve the partnership, provided that at the time the alien is resident and trading in this country. The term "alien enemy" thus includes a person of *any nationality* who resides and trades voluntarily in the enemy country (*Porter v. Freudenberg, etc.* (1915), 1. K.B. 857).

At the present time it is unlawful for more than twenty persons to carry on an ordinary partnership, or for more than ten persons to carry on a banking partnership (Companies Act, 1929, Sections 357, 358).

(d) By decree of the Court.

On application by a partner, the Court may decree a dissolution of the partnership in any of the following cases :—

- (i) When a partner is found **lunatic** by inquisition or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner ;

- (ii) When a partner, other than the partner suing, becomes in any other way **permanently incapable** of performing his part of the partnership contract ;
- (iii) When a partner, other than the partner suing, has been guilty of such **conduct** as, in the opinion of the Court, regard being had to the nature of the business, is calculated to **prejudicially** affect the carrying on of the business ;
- (iv) When a partner, other than the partner suing, wilfully or persistently commits a **breach of the partnership agreement** or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him ;
- (v) When the business of the partnership **can only be carried on at a loss** ;
- (vi) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it **just and equitable** that the partnership be dissolved (Section 35).

The above section is very clear and needs little comment. It may be pointed out that in the case of the lunacy of a partner, application may be made for a decree on his behalf, as well as by the other partners. Under the last clause of the section it is presumed that the Court could decree a dissolution if one of the partners has expressly assigned his share in the business, and so deprived himself of all interest therein.

§ 2.—Notification of Dissolution.

It has already been pointed out that a retiring partner should give notice of retirement. On the

dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence (Section 37).

§ 3.—Continuation of Authority.

After the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise :

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt ; but this proviso does not affect the liability of any person who has, after the bankruptcy, represented himself or knowingly suffered himself to be represented as a partner of the bankrupt (Section 38).

Where judgment has been obtained against a debtor and one of the partners retires from the creditor firm, the remaining partners may issue a Bankruptcy Notice without special leave (*in re Hill, ex p. Holt* (1921), 125 L.T. 736).

§ 4.—The Partnership Lien.

On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interest as partners, to have the property of the partnership applied in payment of the debts and

liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm (Section 39).

This **equitable lien** conferred upon partners will not extend to property mortgaged or pledged by a person apparently entitled so to dispose of it, unless the pledgee had notice of absence of authority for the purpose.

It will be observed that any partner may apply to the Court to wind up the business and affairs of the firm. The Act does not confer any actual right to the appointment of a receiver, but such an appointment may be obtained by application to the Court (see Section 5 *infra*).

§ 5.—The Appointment of a Receiver of Partnership Property.

When dissolution has taken place or is contemplated, upon application to the Court, a receiver of partnership property may be appointed where sufficient grounds for such an appointment can be shown to exist.

The following would constitute grounds for such an appointment :—

- (i) When a partner has so misconducted himself that the property of the firm is in danger of being lost.
- (ii) When a partner desires to enforce his equitable lien on the partnership property and have the

assets of the firm applied in accordance with the provisions of the Act.

- (iii) When all partners are dead and an action is pending between their legal personal representatives.

The Court is, usually, unwilling to appoint a receiver when dissolution is not contemplated, but an appointment may be obtained on the following grounds :—

(a) To receive a certain sum of money and apply it to a specific purpose when there is reason to fear that if it were received by the partners it would be misapplied.

(b) To protect the property of the firm during a dispute between the partners.

The appointment of a receiver under Section 23 (2) (see *ante* p. 54) relates only to the defaulting partner's interest in the firm and not to the partnership property.

§ 6. Return of Premium.

Very frequently an existing firm takes in an additional partner, and charges him a premium for the right which he acquires to share in the profit of an established business. This premium is really a payment for that portion of the goodwill in which he obtains an interest.

Where one partner has paid a premium to another on entering into a partnership for a *fixed* term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued ; unless

(a) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(b) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium (Section 40).

It will be noticed that Section 40 does not apply to a dissolution caused by the death of a partner; in such a case, in the absence of agreement no proportion of the premium paid would be returnable. The lunacy of a partner causing dissolution would perhaps entitle the partner paying the premium to a proportionate return.

It is also clear that in order to obtain a repayment in respect of the premium, the partner who paid it must not have caused the dissolution by his own misconduct, or have agreed to a dissolution without provision for a return of any part of it.

If the partnership agreement itself provides for a return of premium upon dissolution, this must of course be complied with; otherwise the only remedy is by application to the Court, who will in a proper case order a return of a portion bearing the same ratio to the whole premium as the unexpired term of the partnership bears to the whole term, according to the agreement (*Attwood v. Maude* (1868), L.R., 3 Ch. 369).

If a partner by his own misconduct has brought about the dissolution, and has not at the time paid all the agreed premium, he may be ordered to pay the balance (*Bluck v. Capstick* (1879), 12 Ch. D. 863).

In the case of the bankruptcy of one of the partners, it will depend upon circumstances whether or not there is any right residing in the partner paying the premium

to have a return made to him in consequence of the bankruptcy.

If the partner paying the premium becomes bankrupt on the petition of his own partner, the petitioning partner is only entitled to retain such portion of the premium as the Court thinks just (*Hamil v. Stokes* (1817), 4 Pri. 161).

If the partner receiving the premium becomes bankrupt, the bankruptcy being caused by the receiving partner, his estate must return all or part of the premium, according to circumstances, since the bankruptcy arose from his default (*Freeland v. Stansfield* (1852-4), 2 Sm. & G. 479).

If, however, neither party brought about the bankruptcy, but it arose in the ordinary course of events, the partner paying the premium is entitled to no return (*Akhurst v. Jackson* (1818), 1 Swanst. 85). In this case, however, the party paying the premium was aware at the time that the partner receiving it was in financial difficulties. An incoming partner must be deemed to take ordinary business risks shared by the other partners. If, however, the receiving partner was in financial difficulties at the time the premium was paid, and this fact was not known to the partner paying the premium, the latter would be entitled to a proportionate return (*Freeland v. Stansfield*, 2 Sm. & G. 479).

It is also presumed that if B. pays a premium to A. for the purpose of acquiring an interest in a partnership already existing between A. & C., and subsequently C. becomes bankrupt, the partnership being thereby dissolved, B. would, normally, not be entitled to any return unless he had stipulated for this.

It will therefore be seen that it is of the utmost importance that when a partner pays a premium, he should be particularly careful on two points with regard to his partnership agreement. He must remember that in the absence of agreement to the contrary bankruptcy will dissolve the partnership ; and he must also remember that the safest method of ensuring the return of the premium, or part of it, should occasion arise, is to stipulate that this should be done.

§ 7.—Rights of a Defrauded Partner.

Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

- (a) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is
- (b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and
- (c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm (Section 41).

It is only necessary to mention, in connection with this section, that a remedy in such a case would exist under the general Law of Contract ; but the section indicates the rights of the defrauded partner as against the partnership assets, and the fraudulent partner, and is particularly valuable for that reason.

It will be noticed that a defrauded partner is entitled to a lien on the partnership assets to the extent of capital and premium contributed by him, to be subrogated to the rights of creditors of the firm paid by him, as well as to an indemnity against the debts and liabilities of the firm.

§ 8.—Right of Retiring Partner to Share in Profits after Dissolution.

Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to—

- (i) Such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or
- (ii) to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets (Section 42 (1)).

Where the partnership agreement has given an option to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and the option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account in the manner set out above (Section 42 (2)).

If there is any provision in the partnership agreement as to the mode of settlement with a retiring partner or the estate of a deceased partner it must be complied with, and the rights of the outgoing partner will only exist in accordance with such agreement; and this is particularly emphasised by the second clause of Section 42 which shows that any option given to the surviving partners to acquire the share of the outgoing or deceased partner, if properly exercised, prevents the retiring partner or his estate from obtaining any further or other share of profits.

It is not infrequent to find that the provisions as to sharing profits in the event of the death of a partner are different from those applicable when the partner retires. In this connection the case of *McLeod v. Dowling* ((1927), 43 T.L.R. 655) is of interest. A partner had sent by post notice of his retirement, but he died during the night and prior to the receipt of the notice by his co-partners. It was held that the partners' interests were to be determined in accordance with the agreement operative in the event of death, the notice having no effect until receipt by the other partners.

Apparently the safest remedy in general circumstances is to claim for interest on the value of the share (although this may yield rather a small return), since the retiring partner or his legal personal representative cannot claim both interest and profits; and where a claim for profits is made, and it can be shown that, having regard to the nature of the business or other considerations, the profits which have been made, since the retirement, cannot be justly attributed to the use of the assets or capital of the late partner, his *prima facie* right to share such profits will be effectually rebutted (*Lindley*, ninth edition, 715).

If an account of profits is ordered, the Court can make an allowance to the continuing partner for carrying on the business (*Brown v. De Tastet* (1821), 23 R.R. 59; *Manley v. Sartori* (1927), 1 Ch. 157).

§ 9.—Determination of Value of Share of Outgoing Partner.

An important question which arises on the retirement or death of a partner, when the partnership is continued by the remaining partners, is the method of determining the value of the share of the outgoing or deceased partner. When the partnership agreement states the method which is to be adopted, this must be complied with. It is apparent that in order to ascertain the correct amount due to the deceased or retiring partner the assets of the firm should be revalued at the date of the death or retirement and the liabilities similarly reconsidered. This is the proper procedure to adopt if no provision exists in the partnership agreement.

Very frequently it is found that partnership agreements provide that the share of an outgoing partner shall be taken as at the date of the last balance sheet of the firm, but this may prove to be most inequitable if the assets were incorrectly valued in such balance sheet.

Even if the partnership agreement provides that the share of an outgoing partner should be ascertained by reference to the next annual account, the assets of the firm should, in the absence of evidence of any uniform usage to the contrary, be taken at their *fair value* at the date of the account and not at the value appearing in the books (*Cruikshank v. Sutherland*, 92 L.J. Ch. 136 H.L.).

The continuing partners usually pay the retiring partner the actual value of the share, or credit him therewith, with a view to liquidation of his claim by instalments, the firm, as newly constituted, paying the liabilities; and when this is done without a contract of novation, they should give him an indemnity against the liabilities, so that if he is called upon by the creditors to pay them, he can recover from the continuing partners, upon the indemnity which they have given him.

The agreement to indemnify the outgoing partner (or a deceased partner's representative) does not entitle him to insist upon the immediate payment of debts for which no demand has been made, the right to enforce the undertaking only arising when demand for payment is made (*Bradford v. Gammon* (1925), Ch. 132).

§ 10.—Goodwill.

A partner, upon retiring, is entitled to the value of his share of the goodwill, unless the partnership agreement vests it in the continuing or surviving partners; and it is usually provided by the agreement how the value of such share is to be fixed and paid.

Goodwill may be defined as the value attaching to the reputation of a business, and to the likelihood that custom will continue to be attracted in the future as in the past, notwithstanding change in the proprietorship. Goodwill may originate, broadly speaking, in one of three ways, or a combination of them—

- (1) By means of the reputation of the article produced, as apart from the personality of the proprietors.

- (2) By reason of the possession by the business of special advantages in the shape of local or partial monopoly, patents, trade marks, situation of premises, etc.
- (3) By the personal reputation and influence of the proprietors.

Upon an absolute dissolution, every partner has a right to have the goodwill sold for the benefit of all the partners, but a partner must not make use of it for his own exclusive gain, nor do anything detrimental to its value before it is sold (*Turner v. Major* (1862), 3 Giff. 442).

It is most desirable that provision be made in the partnership agreement as to the treatment of goodwill (including the use of the firm name) should the goodwill not be sold upon dissolution, for it would appear that every partner could carry on business in competition with the others, and even use the firm name, so long as his act did not expose the other partners to liability: e.g., by holding them out as his partners (*Burchell v. Wilde* (1900), 1 Ch. 551).

The value of the goodwill, if not previously standing in the partnership books, is divisible amongst the partners as they share profits and losses.

The rights of a purchaser of goodwill are :—

- (a) To represent himself as continuing or succeeding to the business of the vendor.
- (b) The exclusive right to use the name of the firm in respect of which the goodwill is acquired.
- (c) The sole right to solicit the old customers

As against this the purchaser, though entitled to carry on the business as successor of the vendor, must

not do so in such a manner as to indicate that the vendor is a partner in the business, and liable for the debts incurred (*Burchell v. Wilde, supra*).

The vendor of the goodwill may carry on a similar business in competition with the purchaser (subject to any clause in restraint of trade embodied in the contract of sale) but he must not trade in the old firm name or represent himself as continuing that business (*Churton v. Douglas* (1859), Johns. 174), and neither must he solicit his old customers (*Trego v. Hunt* (1896), A.C. 7, 65, L.J. Ch. 1). It should be noted in this connection that a partner who has been expelled from the firm under powers contained in the partnership agreement may compete with his former firm and solicit the customers thereof (*Dawson v. Beeson* (1882), 22 Ch. Div. 504).

Where the partnership agreement provides that on the death of a partner, his share of the property and assets should be taken over by the surviving partner, the executor of the deceased partner can be restrained by injunction from canvassing the customers of the firm (*Boorne v. Wicker* (1927), 1 Ch. 667).

§ 11.—Agreement as to Substituted Partner.

An agreement that a partner shall have power to nominate another person as a partner of the firm, is binding upon the other partners, but merely optional upon the nominee (*Byrne v. Reid* (1902), 2 Ch. 735). Where the admission of the nominee is to take place on the death or retirement of the partner by whom he was nominated and the nominee does not choose to enter the firm, it will be dissolved in the ordinary way.

§ 12.—Rules of Distribution of Assets after Dissolution.

In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed :—

- (a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits ;
- (b) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order :—
 - 1. In paying the debts and liabilities of the firm to persons who are not partners therein ;
 - 2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital ;
 - 3. In paying to each partner rateably what is due from the firm to him in respect of capital ;
 - 4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible (Section 44).

Although the partnership agreement could provide an alternative method of distribution as between the partners, it cannot take away the rights of third parties to be paid in due order of priority.

To students of double-entry book-keeping the above section may at first sight appear to be incomprehensible by reason of the fact that it regards the matter from the cash, rather than from the accounting viewpoint ; upon reflection, however, it will be seen that the application

of the section will have the same effect as the application of normal accounting principles.

If the partners share profits and losses in the same proportions as those in which they have contributed capital and have made no advances to the firm, the position is clear. If the proceeds of the realisation of the assets are not sufficient to meet the external liabilities of the firm, there must have been a loss greater than the combined capitals of the partners. This loss must be borne by the partners in their profit-sharing ratio and will be charged to their accounts, thus placing the latter in debit. The debit balances thus arising must be made good by the partners by the introduction of cash, and is thus contributed in the profit-sharing proportions.

Where partners have contributed capital in a ratio different from that in which they share profits and losses, the meaning of Section 44 is more difficult to understand. Sub section (a), however, states that "losses, including losses and deficiencies of capital" must be paid lastly by the partners in their profit-sharing proportion. Therefore, if after payment of liabilities there is insufficient cash to repay the partners' advances, as distinct from capital, a loss must have been sustained and partners must make it good in their profit-sharing proportions. Similarly, if the partners' capitals exceed the cash available, the difference represents a loss which must be borne by the partners in the ratio in which they share profits and losses.

Where upon dissolution one of the partners has a deficiency of capital, after a realisation of the assets, and he is unable to bring in such deficiency, the same will not be treated as an ordinary trade loss (which would be borne between the partners as they share

profits and losses), but must be regarded as a debt due to the remaining partners individually, and not as a debt due to the firm. Such deficiency must, therefore, be borne by the solvent partners in proportion to their respective *capitals* in the business (*Garner v. Murray* (1904), 73 L.J. Ch. 66).

§ 13.—Amount due to an Outgoing Partner is a Debt.

Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death (Section 43).

It will thus be seen that the amount due from surviving or continuing partners to a retiring partner is a debt accruing at the date of dissolution or death, and the Statutes of Limitation will run as from the date when the right to recover this amount arises.

The surviving or continuing partners will be bound by the terms of the partnership agreement as to the method by which the amount due to the representative of a deceased partner is to be paid. Very frequently the amount found to be due is treated as a liability of the firm, in which case it is presumably a joint liability of the partners. If, however, the agreement contemplates the surviving partners acquiring the share of the deceased partner in specified proportions and requires them to assume joint and several responsibility, the correct method is apparently to charge each partner with the value of the proportion taken by him, leaving each such partner to discharge his own liability, and not to treat the whole liability as a liability of the firm (*Elliott v. Elliott* (1911), 45 Act, L.R. 47).

CHAPTER X
PARTNERSHIP
SYNOPSIS OF PART V
LIMITED PARTNERSHIPS

§ 1 —LIMITED LIABILITY

2 —THE ESSENTIALS OF A LIMITED PARTNERSHIP.

3 —REGISTRATION.

4 —MODIFICATION OF GENERAL PARTNERSHIP LAW

5 —WINDING UP.

CHAPTER X PARTNERSHIP

PART V

LIMITED PARTNERSHIPS

§ 1.—Limited Liability.

Since the Limited Partnerships Act, 1907, came into operation, it has been possible for some members of a firm to obtain limited liability by the registration of the firm under this Act.

The Limited Partnerships Act has not been very largely taken advantage of, the reason being, apparently, that simultaneously with the passing of the Act, the Legislature gave statutory recognition to the principle of *private* companies, so that it became possible for an association of persons, with a minimum number of two, to secure limited liability under the Companies Act. Limited liability was thus possible for all members, whereas in a limited partnership this advantage is only obtainable by some, as at least one partner of such a firm must be a general partner with unlimited liability.

§ 2.—The Essentials of a Limited Partnership.

A limited partnership shall not consist, in the case of a partnership carrying on the business of banking, of more than ten persons, and, in the case of any other partnership, of more than twenty persons, and must consist of one or more persons called *general* partners, who shall be liable for all debts and obligations of the firm, and one or more persons to be called *limited*

partners, who shall, at the time of entering into such partnership, contribute thereto a sum or sums as capital or property valued at a stated amount, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed (Section 4 (2)).

It will be seen from the above that the limited partner must contribute his capital at the time of entering into the partnership ; it cannot be left to be called upon as and when required.

A *limited* partner shall not during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his contribution, and if he does so draw out or receive back any such part, shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back (Section 4 (3)).

The firm must be registered with the Registrar of Companies, and if business is commenced before this has been effected, the partners will be trading in the meantime as a general partnership. A body corporate may be a limited partner.

It must be borne in mind that a body corporate can only act within the scope of the authority under which it comes into existence. Thus, a limited company under the Companies Act, 1929, may be a limited partner, but only so long as the business of the limited partnership falls within the scope of its memorandum.

§ 3.—Registration.

As already stated, every limited partnership must be registered as such with the Registrar of Companies, and in default thereof it will be deemed to be a general

partnership, and every limited partner will be deemed to be a general partner.

The registration of a limited partnership is effected by sending by post or delivering to the Registrar at the register office in that part of the United Kingdom in which the principal place of business of the limited partnership is situated or proposed to be situated, a statement signed by the partners containing the following particulars :—

- (a) The firm name ;
- (b) The general nature of the business ;
- (c) The principal place of business ;
- (d) The full name of each of the partners ;
- (e) The term, if any, for which the partnership is entered into, and the date of its commencement ;
- (f) A statement that the partnership is limited, and the description of every limited partner as such ;
- (g) The sum contributed by each limited partner, and whether paid in cash or how otherwise (Section 8).

If during the continuance of a limited partnership any change is made or occurs in—

- (a) The firm name ;
- (b) The general nature of the business ;
- (c) The principal place of business ;
- (d) The partners or the name of any partner ;
- (e) The term or character of the partnership ;
- (f) The sum contributed by any limited partner ;
- (g) The liability of any partner by reason of his becoming a limited instead of a general partner, or a general instead of a limited partner ;

a statement, signed by the firm, specifying the nature

of the change must within seven days be sent by post or delivered to the Registrar at the register office in that part of the United Kingdom in which the partnership is registered (Section 9).

If default is made in compliance with the requirements of Section 9, *each* of the general partners will, on conviction under the Summary Jurisdiction Acts, be liable to a fine not exceeding one pound for each day during which the default continues.

Notice of any arrangement or transaction under which any person will cease to be a general partner in any firm, and will become a limited partner in that firm, or under which the share of a limited partner in a firm will be assigned to any person, must be advertised forthwith in the *Gazette*, and until notice of the arrangement or transaction is so advertised, the arrangement or transaction is for the purposes of the Act deemed to be of no effect (Section 10).*

The amount registered as the capital contributed by a limited partner is subject to stamp duty at the rate of ten shillings per centum, fractions of £100 being counted as £100 (Finance Act, 1933†). If default is made in payment of the requisite duty, the latter, together with interest at the rate of 5% per annum, is a joint and several debt due to the Crown by all the partners.

If the capital of a limited partner is increased the same rate of duty is payable on the increase.

* For the purposes of Section 10, the expression "the *Gazette*" means : — In England, the *London Gazette*, in Scotland, the *Edinburgh Gazette*, in Ireland, the *Dublin Gazette* (In the case of Northern Ireland, the *Belfast Gazette*.)

† The stamp duty provided by Section 11, Limited Partnerships Act, 1907, was five shillings per centum. This was increased by Section 30, Finance Act, 1920, to £1 per centum, and reduced by the Finance Act, 1933, as and from 26th April, 1933.

The Registrar of Companies is required to keep a register and index of all limited partnerships, and of all statements filed thereby, and such records are open to the inspection of any person on payment of the usual search fees. Certified copies of any documents may be obtained on payment of the usual fees.

It will be observed that the *limited* partner must himself see that the partnership is registered, as otherwise he will be deemed to be a general partner; but the duty of registering any change in the partnership rests with the general partners, who are liable to a fine not exceeding £1 for each day during which a default continues. The stamp duty of ten shillings per cent. on the amount contributed by a limited partner is the same as that upon the nominal capital of a limited company, while the registration fees are £2 for the original registration and 5s. in respect of any change notified.

The making of false returns, for the purpose of registration under the Limited Partnerships Act, is a misdemeanour, punishable with two years imprisonment, with or without hard labour, or to a fine, or to both imprisonment and a fine (Perjury Act, 1911, Section 5).

There is no provision in the Act requiring the fact that a partnership is limited to be disclosed in the firm name.

§ 4.—Modification of General Partnership Law.

The provisions of the Partnership Act, 1890, and the rules of equity and common law applicable to partnerships also apply to limited partnerships in-so-far as they are not inconsistent with the Limited

Partnerships Act, 1907 (Section 7). The general law has been modified as under.

- (1) A limited partner may not take part in the management of the partnership business, and has no power to bind the firm. A limited partner may, however, by himself or his agent at any time inspect the books of the firm and examine into the state and prospects of the partnership business, and may *advise* with the partners thereon.

If a limited partner takes part in the management of the partnership business, he is liable for all debts and obligations of the firm incurred *while he so takes part* in the management as though he were a general partner.

- (2) A limited partnership is not dissolved by the death or bankruptcy of a limited partner, and the lunacy of a limited partner is not a ground for dissolution of the partnership by the Court unless the lunatic's share cannot be otherwise ascertained and realised.
- (3) In the event of the dissolution of a limited partnership, its affairs are wound up by the general partners unless the Court otherwise orders.
- (4) Subject to any agreement expressed or implied between the partners—
 - (a) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the *general* partners ;
 - (b) A limited partner may, with the consent of the general partners, assign his share in the partnership, and upon such an assignment

the assignee becomes a limited partner with all the rights of the assignor ;

- (c) The other partners are not entitled to dissolve the partnership by reason of any limited partner suffering his share to be charged for his separate debt ;
- (d) A person may be introduced as a partner without the consent of the existing limited partners ;
- (e) A limited partner is not entitled to dissolve the partnership by notice.

These provisions vary Sections 24, 26, 31 and 33 of the Partnership Act, 1890.

It will also have been seen from Section 4 (3) that a limited partner cannot, during the continuance of the partnership, withdraw any part of his capital ; if he desires to dispose of his interest in the firm, he has no alternative but to assign his share, with the consent of the general partners, to some other person.

§ 5.—Winding-up.

The death or bankruptcy of a *limited* partner does not, in the absence of agreement, dissolve the partnership. If the limited partner becomes insane, the partnership is only dissolved if his share cannot be otherwise ascertained.

The business will be wound up by the general partners unless the Court otherwise directs. It may, however, be wound up in bankruptcy, and on all the general partners being adjudicated bankrupt, the assets of the limited partnership vest in the trustee (Bankruptcy Act, 1914, Section 127).

SYNOPSIS OF CHAPTER XI

ARBITRATION AND AWARDS

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- (p) Referring back the Award.
- (q) Enforcing the Award.
- (r) Time limit for Arbitrations and enforcing Awards.

CHAPTER XI

ARBITRATION AND AWARDS

§ 1.—Arbitrations Generally.

(a) Definitions.

Arbitration consists of the reference of a dispute to one or more independent persons for settlement, instead of to a Court of Law.

There can be no arbitration by consent out of Court without a submission, which may be defined as the agreement between the parties to refer the decision of differences to one or more arbitrators. Under the Arbitration Act, 1889, the submission must be in writing (§ 27); a verbal submission would give rise to an arbitration at common law to which the Arbitration Acts would have no application; under certain Acts of Parliament specified notices and proceedings are made equivalent to a submission. The Court has power in certain circumstances to refer a matter to arbitration without the consent of the parties.

The reference is—strictly—the proceedings during the arbitration; but the term is also used to denote the submission itself.

The arbitrator is the person to whose decision the matters in dispute are referred. His decision is called the award.

The umpire is a person appointed, when the reference is to more than one arbitrator, to give a decision if the arbitrators cannot agree. His decision is called the umpirage.

(b) Advantages of Arbitration.

The principal advantages of arbitration are—

- (1) The avoidance of publicity ;
- (2) The simplicity of procedure ;
- (3) The avoidance, to a certain extent, of the delays, uncertainty and expense involved in appeals ;
- (4) The saving of time ;
- (5) The saving of expense ;
- (6) Possible technical knowledge of the arbitrator.

The Law Courts are open to the public and the press, and when an action takes place, the facts brought out by the evidence become public property ; whereas an arbitration is conducted privately, and there is no reason why information concerning it should be made public.

The general procedure during an arbitration is comparatively simple ; but in practice it will vary according to the magnitude of the issue. In any case it is much less formal than the fixed procedure of the Courts. ♦

Partly as a result of this, and partly owing to the fact of the arbitrator's duties being confined to the one issue, the matter can be disposed of much more expeditiously than if it were taken to a Court of Law ; while assuming the award to be good, the result is final, and is not subject to appeal and the delays arising therefrom.

It is a well-known fact that the expenses incurred in a legal action are heavy. The various court fees, the solicitors' costs, and the fees of counsel, in many cases amount to large sums ; and while an arbitrator, like any other man of business, does not work for

nothing, his remuneration and the costs of the arbitration will, as a rule, be less than those of an action-at-law.

The fact that in disputes involving technical differences an arbitrator may be appointed who has special knowledge of the business concerned, is in many cases a further advantage.

(c) Disadvantages of Arbitration.

The principal disadvantages of arbitration are—

- (1) The arbitrator may be incompetent or biassed ;
- (2) Injustice may result from the informality of the procedure.

Arbitration has its disadvantages as well as its advantages, and not the least of these is the difficulty of choosing the arbitrator. If a man of business is chosen, he may not be well versed in the law ; or if a lawyer is chosen, he may be devoid of the special knowledge and experience which ought to be brought to bear on the dispute. If appointed by one of the parties, he is liable to be biassed in favour of that party ; while if two arbitrators are appointed, each is liable to consider himself the advocate of the party who appointed him. To obviate these disadvantages, the practice of naming an independent person to appoint the arbitrator—*e.g.*, the President of the Institute of Chartered Accountants has been frequently adopted, and an appointment so made does, without doubt, tend to secure a more judicial consideration of the points in dispute than might otherwise prevail.

If a mistake is made in the choice of the arbitrator, two serious circumstances may arise. If he is an incompetent person he may make a bad award, which will render all the proceedings void, to the detriment

of the parties, whose time and money will have been wasted; and on the other hand, if he is competent but biassed, although he may give no cause of complaint in the conduct of the proceedings, he may make an award which is not in accord with the facts and the true legal rights of the parties, and such award will be final and binding.

Another point which, although advantageous from one aspect, may yet operate disadvantageously, is that the procedure on a reference is not so strictly defined as that which obtains in the Courts of Law, this being a matter which the arbitrator may control within certain limits, at his discretion.

(d) References which are not Arbitrations.

The essence of an arbitration is that there must be differences either existing or prospective between the parties, which the parties agree, or which the Court orders, shall be finally and conclusively settled by the judicial decision of the arbitrator.

If a third party has to decide the amount to be paid for certain property on his own judgment or experience without hearing evidence or arguments on either side, this is not an arbitration but a valuation.

Where a contract for the sale of an estate provided that the timber should be taken at a valuation, each party to appoint his own valuer, and that such valuers should, in case of difference, appoint an umpire, it was held that the Court had no power to set aside such an umpire's valuation, he being merely a valuer, and not an arbitrator (*Re Carus-Wilson & Greene* (1886), 18 Q.B.D. 7).

The position of an architect or engineer who has to give certificates for the payment of the price of work

done under a contract is a doubtful one. The earlier cases regarded him as a valuer only ; later cases have treated him as, in some respects, an arbitrator.

Thus a building contract provided for payments on account of the price of works during their progress, and for payment of the balance after their completion, upon certificates of the architect: and the final certificate was to be conclusive evidence of the works having been duly completed, upon which the contractor was entitled to receive payment of the final balance. The Court of Appeal held that the architect occupied the position of an arbitrator, on the ground that he had to settle matters in respect of which, though there was no actual dispute, there would probably be a dispute unless they were so settled (*Chambers v. Goldthorpe* (1901), 1 K.B. 624).

The essential differences between an arbitration and a valuation are as follows :—

- (1) The provisions of the Arbitration Acts relating to arbitrations have no application to valuations;
- (2) An arbitration is a proceeding of a semi-judicial nature ; a valuation is not ;
- (3) An arbitrator, being in a semi-judicial position, is not liable to an action for negligence by the parties ; a valuer is liable to the party appointing him according to the terms of the contract whereby he undertakes the valuation ;
- (4) An award can be enforced by leave of the Court in the same manner as a judgment or order of the Court ; a valuation simply fixes a term of a contract, leaving the parties to their remedies on the contract ;

- (5) The award of an arbitrator may be set aside ; the valuation of a valuer cannot be set aside ;
- (6) An award must bear a 10/- stamp ; a valuation must be stamped as an appraisalment with an *ad valorem* stamp.

(e) Who may refer to Arbitration.

Any person, whether individual or corporation, who can enter into a contract can submit to arbitration. A person who cannot contract, cannot be bound by a submission. Thus, an infant, although he may submit to arbitration, may avoid the award, unless it is in respect of a contract binding on him.

Persons having no beneficial interest in the subject-matter of the reference may submit to arbitration, *e.g.*, executors, trustees, a trustee in bankruptcy ; but the submission will amount to an admission of assets and involve personal liability, unless otherwise stipulated.

An agent duly authorised may bind his principal by submission to arbitration ; and an implied authority may arise from the nature of the agency. If the submission is to be by deed, the agent must be appointed by deed. The agent should submit in the principal's name, otherwise he will be personally bound. The fact that to come within the operation of the Arbitration Acts the submission is to be in writing does not imply that the authority of the agent must be similarly evidenced. An agent, orally appointed and duly authorised, may apparently refer to arbitration a dispute in which his principal is involved.

A bankrupt can submit disputes in respect of which he is a party to arbitration, but the award will only bind him personally and not his estate.

One partner cannot submit to arbitration so as to bind the others without their assent ; but the partner submitting will be personally bound by the award ; and the other partners may become bound by implication ; as, for instance, if they appear before the arbitrator without objecting (*Thomas v. Atherton* (1878), 10 Ch. D. 185). The fact that one partner has authorised the other, upon a dissolution, to collect the firm debts and to take legal proceedings in their joint names to recover them, does not authorise the acting partner to bind the retiring partner by the reference to arbitration of an action brought under the power conferred (*Hatton v. Royle* (1858), 27 L.J. Ex. 486).

(f) Subject-matter of the Reference.

All matters that might be settled by action between the parties in a Court of Law may be referred to arbitration, with the following exceptions :—

- (a) Purely criminal matters, since the party concerned, if guilty, should be punished, and that only the Courts can do. If, however, the party injured by a criminal offence has also a civil remedy, the civil claim may be referred to arbitration ; but if a criminal prosecution has been commenced, the consent of the Court is required to refer the civil claim to arbitration ;
- (b) Matters affecting status, such as a suit for dissolution of marriage, or proceedings in bankruptcy.

(g) Methods of referring to Arbitration.

A reference to arbitration may be made in any of the following ways :—

- (a) Under special Acts of Parliament ;

(b) Under Order of the Court --

- (i) By virtue of the inherent jurisdiction of the High Court of Justice ; or
 - (ii) By virtue of the powers conferred on the High Court of Justice and the Court of Appeal, by §§ 88 and 89 of the Judicature Act, 1925 ;
 - (iii) By virtue of the powers conferred on the County Court Judge, by §§ 89 and 90 of the County Courts Act, 1934.
- (c) By voluntary submission of the parties verbally at common law ;
- (d) By submission in writing under the Arbitration Acts, 1889 and 1934.

§ 2.—References under special Acts of Parliament.

Provision has been made by various special Acts of Parliament for the reference to arbitration of many matters. The most important Acts in this connection are —

- (a) The Lands Clauses Consolidation Act, 1845 (relating to compensation for land taken for public purposes, or injured by works undertaken therefor, if the amount claimed exceeds £50) ;
- (b) The Companies Clauses Consolidation Act, 1845 (relating to matters authorised to be settled by arbitration by Acts of Parliament incorporating this special Act) ;
- (c) The Acquisition of Land (Assessment of Compensation) Act, 1919 (relating to compensation for land acquired compulsorily under various Acts of Parliament, such as the Public Health

Act, 1936, the Housing Act, 1936, and the Town and Country Planning Act, 1947, by any Government Department, or any Local or Public Authority);

- (d) The Companies Act, 1948 (relating to valuation of a company's shares held by a member dissenting from a scheme of reconstruction).

In some cases, arbitration is the only method of procedure, in others, it is an optional method.

The Arbitration Act, 1889, applies to every arbitration under any Act of Parliament passed either before or after the commencement of that Act, as if the arbitration were pursuant to a submission, except in-so-far as the Arbitration Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that special Act. The Arbitration Act, 1934, similarly applies, with the exception of the following provisions :—

- (a) The effect of the death of a party on the proceedings ;
- (b) The effect of the bankruptcy of one of the parties ;
- (c) The appointment of an arbitrator by the Court in certain circumstances where one of the arbitrators has been removed ;
- (d) Direction of the Court that matters forming the subject of an inter-pleader are to be referred to arbitration in conformity with an agreement to refer ;
- (e) Prohibition of agreement between parties as to payment of costs in any event ;

- (f) Power of the Court to give relief where the arbitrator is not impartial or the dispute involves questions of fraud ;
- (g) Limitation of time for commencing proceedings.

§ 3.—References under order of the Court.

- (a) By virtue of the inherent jurisdiction of the High Court of Justice.

The High Court of Justice has inherent jurisdiction to make an order for reference to arbitration where the parties so desire, quite independently of their jurisdiction under statute referred to hereafter. This inherent jurisdiction is wider than the statutory jurisdiction, because the subject-matter of the reference is not necessarily limited to the cause or matter in which the order for reference to arbitration is made, for the order may include all matters in difference between the parties. In such cases the action is stayed by agreement between the parties, and an arbitration similar to an arbitration pursuant to a submission out of Court takes place.

- (b) By virtue of the powers conferred on the High Court of Justice and the Court of Appeal, by §§ 88 and 89 of the Judicature Act, 1925.

Under Section 88 of the Judicature Act, 1925, subject to Rules of Court and to any right to have particular cases tried with a jury, the Court or a Judge may refer to an official or special referee for enquiry or report any question arising in any cause or matter, other than a criminal proceeding by the Crown. The report of an official or special referee may be adopted wholly or partially by the Court or a Judge, and if so adopted may be enforced as a Judgment or Order to the same effect. It is to be observed that this reference may be made even against the wishes of the parties.

The reference being made simply for enquiry and report, the referee has no authority to settle the matter in dispute. He has simply to hold an enquiry by means of witnesses, and to report on certain specific questions referred to him ; or, if facts are in dispute, he is to find what the facts actually are, and on his finding the Court bases its decision. Since the Court in this case gives the actual decision, an appeal can be made in the ordinary way.

Under Section 89 of the Judicature Act, 1925, in any cause or matter, other than a criminal proceeding by the Crown—

- (a) If all the parties interested who are not under disability consent ; or
- (b) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a Judge conveniently be made before a jury or conducted by the Court through its other ordinary officers ; or
- (c) If the question in dispute consists wholly or in part of matters of account ;

the Court or a Judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court. In these cases of reference for trial, judgment is entered in accordance with the decision of the referee or arbitrator. Appeal from the decision lies to the Court of Appeal on a point of law only (Administration of Justice Act, 1932, § 1), and thence, with leave, to the House of Lords.

- (c) By virtue of the power conferred on the County Court Judge, by §§ 89 and 90 of the County Courts Act, 1934.

Under Section 89 of the County Courts Act, 1934, the Judge may, with the consent of the parties to any proceedings, order the proceedings to be referred to arbitration (whether with or without other matters within the jurisdiction of the Court in dispute between the parties) to such person or persons and in such manner and on such terms as he thinks just and reasonable. It is to be observed that this reference can only be made by consent of the parties, and having been made it is not revocable by any party except with the consent of the Judge. The award of the arbitrator is entered as the Judgment in the proceedings and is as binding and effectual to all intents as if given by the Judge, except that, if application is made to the Judge at the first Court held after the expiration of one week from the entry of the award, the Judge may set aside the award, or, with the consent of the parties, revoke the reference, or order another reference to be made in the same manner.

Under Section 90 of the County Courts Act, 1934, the Judge may, subject to County Court Rules, refer to the Registrar or a referee for enquiry and report—

- (a) Any proceedings which require any prolonged examination of documents, or any scientific or local investigations which cannot, in the opinion of the Judge, conveniently be made before him ;
- (b) Any proceedings where the question in dispute consists wholly or in part of matters of account ;
- (c) With the consent of the parties any other proceedings ;

- (d) Subject to any right to have particular cases tried with a jury, any question arising in any proceedings.

The above provisions are similar to those contained in Section 89 of the Judicature Act, 1925, in relation to references for trial by the High Court or the Court of Appeal, but under the County Courts Act, the Judge does not refer these matters for trial, but simply for enquiry and report; consequently, judgment on the report can only be entered by the direction of the County Court Judge, and appeal from any Order he may make will lie in the ordinary way.

§ 4. —References by voluntary submission of the parties verbally at Common Law.

A valid submission to arbitration by consent of the parties can be made verbally at common law. The provisions of the Arbitration Acts, 1889 and 1934, have no application to such a submission. A verbal submission of this kind has the following disadvantages:—

- (a) There may be a conflict of evidence as to the terms of the submission;
- (b) If one party commences legal proceedings in lieu of going to arbitration, the Court has no power to stay those proceedings;
- (c) If one party refuses to proceed with the arbitration, the only course of the other party is to commence legal proceedings;
- (d) There is no means of enforcing the award of the arbitrator except by action in the Courts;
- (e) All the terms of the submission must be agreed, as the Arbitration Acts have no application;

- (f) If the subject-matter of the dispute is a contract for which evidence in writing is required under § 4 of the Statute of Frauds, 1677, § 4 of the Sale of Goods Act, 1893, or § 40 of the Law of Property Act, 1925, no action can be taken to enforce an award based on a verbal submission.

§ 5. References by consent out of court under the Arbitration Acts, 1889 and 1934.

(a) The Submission.

The Arbitration Act, 1889, defines a submission as a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not (§ 27).

The submission may be by writing under hand only, by deed, or by bond, signed either by the party or by his duly authorised agent. A party who has not signed may be bound if the agreement to refer, having been signed by one party, is confirmed by the subsequent conduct of the party who has not signed. Thus, a fire insurance policy contained a clause that any differences under it should be referred to arbitration; the assured sued the insurance company and by so doing affirmed the policy as his contract, and thereby constituted the arbitration clause a submission, although he had not signed the policy; and the Court stayed proceedings under § 4 of the Arbitration Act, 1889 (*Baker v. Yorkshire Fire & Life Insurance Co.* (1892), 1 Q.B. 144).

Where the articles of a company contain a clause providing that all disputes between the company and any member shall be referred to arbitration, a member is bound by the clause though he did not sign the

articles, since the application for and admission to membership implies an agreement to be bound by the terms of the articles (*Hickman v. Kent or Romney Marsh Sheep Breeders' Association* (1915), 1 Ch. 881).

If the award would have to be carried out by the execution of a deed, the submission should itself be by deed. A submission by a corporation should be made under the common seal of the corporation; but in this case, the other party, if an individual, need not himself seal the submission; his signature is sufficient.

The parties may agree to refer to arbitration a dispute which has actually arisen, or some difference that may conceivably arise in the future in relation to some contract or relationship into which they have entered. Agreements to refer future disputes to arbitration are frequently found in deeds of partnership, insurance policies, leases and contracts for the sale of goods. The submission should indicate whether all matters of dispute which might arise between the parties should be subject to arbitration, and if not, the scope of the arbitration clause should be clearly defined.

The terms of a submission may, with the agreement of the parties, be altered at any time before the arbitrator has given his decision. The alterations must be in writing, and if the submission is by deed, any alteration of its terms must be similarly executed. The submission cannot be altered so as to include a dispute about which an action has already been commenced by one of the parties against the other. Any alteration must be made at the instance of the parties: the arbitrator has no authority to effect an amendment.

By § 1 of the Arbitration Act, 1889, a submission, unless a contrary intention is expressed therein, shall

be irrevocable except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an Order of the Court. This provision, while preventing the revocation of the submission by one party against the will of the other, does not presumably prevent a revocation by mutual agreement.

(b) Effect of Death or Bankruptcy.

An arbitration agreement is not discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such an event be enforceable by or against the personal representatives of the deceased; nor is the authority of an arbitrator revoked by the death of any party by whom he was appointed (Arbitration Act, 1934, § 1 (1) and (2)). These provisions do not affect the operation of any enactment or rule of law by virtue of which any right of action is extinguished by the death of a person, such as rights of action in tort for defamation or seduction, inducing one spouse to leave or remain apart from the other, or for damages on the ground of adultery.

If a party to a contract containing an arbitration clause becomes bankrupt, the clause is enforceable by or against the trustee in bankruptcy if he adopts the contract (Arbitration Act, 1934, § 2 (1)). If, on the other hand, submission made by a bankrupt before the commencement of his bankruptcy does not relate to a contract adopted by the trustee, but relates to a matter requiring to be determined in the bankruptcy proceedings, a different rule applies. In that event, any other party to the agreement or, with the consent of the committee of inspection, the trustee in bankruptcy may apply to the Court having jurisdiction in the

bankruptcy proceedings for an Order directing that the matter in question shall be referred to arbitration in accordance with the submission, and that Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an Order accordingly.

(c) Ousting the Jurisdiction of the Court.

An agreement which purports to oust the jurisdiction of the Court is illegal and void, since it is presumed to be contrary to public policy to allow the jurisdiction of the Court to be ousted by agreement. An agreement to refer to arbitration does not as a rule oust the jurisdiction of the Court, because it is still open to the parties to take legal proceedings instead of going to arbitration, though it may well be in such a case that the Court will exercise its power under § 4 of the Arbitration Act, 1889, to stay proceedings on the application of the other party. Furthermore, if the agreement provides that a reference to arbitration shall be a "condition precedent to the right to sue," or that no cause of action shall arise until the dispute has been referred to arbitration, no action can successfully be brought until a reference to arbitration has taken place, because, by the terms of the agreement itself, no cause of action exists until then (*Scott v. Avery* (1856), 5 H.L. Cas. 811). Nevertheless, where it is provided that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders that the agreement shall cease to have effect as regards any particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect

as regards that dispute (Arbitration Act, 1934, § 3 (4)). In this way a cause of action may arise in spite of the provisions of the agreement.

(d) Stay of Proceedings.

Specific performance will not be granted in respect an agreement to refer to arbitration (*South Wales Railway Co. v. Wythes*, 5 De G.M. & G. 880); but if arbitration has been agreed upon, and notwithstanding this an action is brought by one of the parties, the Court may under certain conditions stay the proceedings, which will have the effect of compelling the parties to go to arbitration if they wish to have their dispute settled. Section 4 of the Arbitration Act, 1889, provides that if any party to a submission commences any legal proceedings against any other party to the submission in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, but before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court or a Judge, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings.

A "step in the proceedings" as referred to above, which would prevent the action being stayed by the Court, must be one which is in the form of an application to the Court and not in the form of an application from one party to the other. The entering of an appearance by the defendant, which indicates his

intention to defend the action, is not a "step in the proceedings." The following, *inter alia*, are "steps in the proceedings" :—

- (a) Taking out a summons for an extension of time in which to deliver a defence (*Ford's Hotel Co. v. Bartlett* (1896), 65 L.J. Q.B. 166).
- (b) Applying to the Master for security for costs (*Adams v. Catley* (1892), 66 L.T. 687).
- (c) Obtaining an order for the delivery of interrogatories (*Chappell v. North* (1891), 2 Q.B. 252).
- (d) Attending at Chambers on a hearing of a summons for directions, without objection (*County Theatres and Hotels v. Knowles* (1902), 1 K.B. 480).
- (e) Obtaining an order for particulars and agreeing to an order for discovery (*Parker, Gaines & Co. v. Turpin* (1918), 1 K.B. 368).
- (f) Opposing a summons for leave to sign final judgment (*Pitchers Ltd. v. Plaza (Queensbury) Ltd.* (1940), 1 All E.R. 151).

The following are not "steps in the proceedings" :—

- (a) A demand made to the plaintiff for a statement of claim (*Ives & Barker v. Williams* (1894), 2 Ch. 478).
- (b) Obtaining from the plaintiff to the action an extension of time for delivery of defence (*Brighton Marine Palace & Pier v. Woodhouse* (1893), 2 Ch. 486).
- (c) Filing affidavits in answer to a motion for the appointment of a Receiver (*Zalinoff v. Hammond* (1898), 2 Ch. 92).
- (d) Taking out a summons to have the proceedings transferred from one list to another (*Lane v. Herman* (1939), 1 All E.R. 353).

Under the Arbitration Clauses (Protocol) Act, 1924, as amended by § 8 of the Arbitration (Foreign Awards) Act, 1930, (which is designed to give effect to a protocol on arbitration clauses promulgated by the League of Nations), if any party to a submission made in pursuance of an agreement falling within the scope of the protocol attached to the Act, commences legal proceedings against any other party to the submission in respect of any matter agreed to be referred, the Court upon application is bound to make an order staying the proceedings, unless satisfied that the arbitration has become inoperative or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred (§ 1). In this case the discretion of the Court given by § 4 of the Arbitration Act, 1889, is removed.

In all other cases, if the conditions of § 4 of the Arbitration Act, 1889 are satisfied, it is within the discretion of the Court whether or not it will stay proceedings, and the burden of proof is upon the party opposing the stay to satisfy the Court that there is good reason for proceeding with the action instead of granting the stay. It is probable that the Court will refuse a stay in the following circumstances : -

- (a) If the only question to be decided is a question of law, which the arbitrator would have to deal with by stating a case for the Court (*re Carlisle, Clegg v. Clegg* (1890), 59 L.J. Ch. 520).
- (b) Where the arbitrator is not or may not be impartial, even if he was agreed upon by the parties before the dispute had arisen (*Bristol Corporation v. John Aird & Co. Ltd.* (1913), A.C. 241).

- (c) Where a dispute involves the question whether any party has been guilty of fraud, particularly if the person charged with fraud is desirous of having the matter dealt with by the Court (*Minifie v. Railway Passengers Assurance Society* (1881), 44 L.T. 552).

Where the Court has power under the Arbitration Act, 1934, § 14, to order that an agreement to refer shall cease to have effect, or to give leave to revoke a submission, on the grounds that the arbitrator is or may not be impartial, or that the dispute involves the question whether one of the parties has been guilty of fraud, the Court may refuse to stay any action brought in breach of the agreement (Arbitration Act, 1934, § 14 (3)).

If a dispute between parties in connection with a contract containing an arbitration clause is whether the contract has ever been entered into at all, or if it is contended that the contract is void *ab initio*, for example, on account of illegality or mistake, the matter cannot be referred to arbitration and so no stay of proceedings will be ordered, because the arbitration clause will fall if the contract falls. If, however, the parties do not dispute that they have entered into a binding contract, but the question is whether there has been a breach by one side or the other, or whether circumstances have arisen excusing further performance of the contract, the Court can quite properly exercise its discretion to stay proceedings (*Heyman v. Darwins, Ltd.* (1942), A.C. 356). Similarly, if there is a deviation from the terms of the contract by one party, this will not put an end to the arbitration clause nor disentitle the Court to grant a stay of proceedings upon the application of that party (*Woolf v. Collis Removal Service* (1947), 2 All E.R. 260).

(c) Arbitration Clause and Third Parties.

If the benefit of a contract is assignable, as it will be if it is not of a personal nature, the arbitration clause will follow the assignment of the contract and be enforceable by and against the assignee. Thus, in *Aspell v. Seymour* ((1929), 167 L.T.J. 481), when the assignee of a debt due under a contract containing an arbitration clause sued the debtor for payment, it was held that the Court had power to stay proceedings pending a reference of the matter to arbitration. Again, in *Shayler v. Woolf* ((1946), 2 All E.R. 54), it was held that the presence of an arbitration clause in an agreement relating to the supply of water to land did not prevent the benefit of that agreement passing to an assignee on the sale of the land.

It, although an assignment has taken place, arbitration proceedings are instituted between the original parties, the arbitrator must take account of the legal position created by the assignment, and if he gives an award in favour of the assignor it will be bad, because it is no longer the assignor who is entitled to the benefit of the contract.

Thus, in *Cottage Club Estates v. Woodside Estate Co.* (Amersham) ((1928), 2 K.B. 463), building contractors who had made a contract with building owners containing an arbitration clause, assigned their rights to all moneys due or to become due under the contract to a bank. Subsequently arbitration proceedings took place between the building contractors and the building owners, and the arbitrator, with knowledge of the assignment, awarded the payment of a sum of money to the building contractors. On a case stated for the opinion of the Court, it was held that the award was bad, due to its awarding payment to the building

contractors, who in view of the assignment were not entitled to any moneys under the contract.

(f) The Arbitrator.

The parties may choose as an arbitrator any person they please. If they choose an incompetent person, they are precluded from subsequently objecting to him on the ground of his incapacity, though if his award is bad they may apply to the Court to have it set aside. If, however, the arbitrator is not, or may not be, impartial, either party may, if the arbitrator was named or designated in the agreement and a dispute has arisen, apply to the Court under § 14 of the Arbitration Act, 1934, for leave to revoke the submission, or for an injunction to restrain the other party or the arbitrator from proceeding with the arbitration, and it shall not be a ground for refusing the application that the party so applying knew or ought to have known that the arbitrator by reason of his relation towards any other party to the agreement or of his connection with the subject referred might not be capable of impartiality.

Opinions vary as to whether it is better to have a layman or a lawyer as an arbitrator. While the qualifications of the person to be selected must depend to a great extent on the nature of the reference, it is by no means certain that because a man is skilled in the interpretation of points of law, he is specially qualified to weigh and appreciate the value of evidence given; nor on the other hand does it necessarily follow that a layman familiar with the type of business concerned can bring the required judicial impartiality and penetration to bear on the dispute.

The arbitrator will be appointed in accordance with the provisions of the submission; if no other mode of

reference is provided, the reference will be to a single arbitrator (Arbitration Act, 1889, First Schedule, para. (a)). Where the reference is to a single arbitrator and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator, any party may serve upon the others written notice to appoint an arbitrator, and if the appointment is not made within seven clear days after service of the notice, the Court may appoint (Arbitration Act, 1889, Section 5).

If the reference is to two arbitrators, the two arbitrators shall appoint an umpire immediately after they are themselves appointed (Arbitration Act, 1889, First Schedule, para (b), as amended by § 5 (1) of the Arbitration Act, 1934). This provision is made to ensure that there be no deadlock in the event of disagreement between the arbitrators.

Where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties (Arbitration Act, 1934, Section 4 (1)). Where the appointment of three arbitrators is made in any other way, they will all three act as arbitrators and the award of any two will be binding (Arbitration Act, 1934, § 4 (2)). The distinction between a third arbitrator and an umpire is that a third arbitrator is one of three arbitrators who must all act together and whose duties commence immediately, whereas an umpire does not act with the arbitrators, but enters upon the reference when they have disagreed.

If an appointed arbitrator refuses to act or is incapable of acting, or dies, then if he was one of two arbitrators, one appointed by each party, the party who appointed him may appoint a new arbitrator in his place (Arbitration Act, 1889, § 6 (a)), subject to the power of the Court to set aside any such appointment, but if the party does not so appoint, or in other cases where the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy, the Court may appoint (Arbitration Act, 1889, § 5 (b)). If, on a reference to two arbitrators, one to be appointed by each party, one party fails to appoint for seven clear days after the other party, having appointed his arbitrator, has served notice on the first party to make the appointment, the party who has appointed an arbitrator may appoint him to act as sole arbitrator, and his award shall be binding on both parties as if he had been appointed by consent (Arbitration Act, 1889, § 6 (b)). In such a case, it is essential that the party shall actually appoint the arbitrator as sole arbitrator, as the arbitrator has no authority to proceed alone with the arbitration unless he has been so appointed (*Drummond v. Hamer* (1942), 1 All E.R. 39). The Court has power to set aside the appointment of a sole arbitrator in these circumstances.

(g) The Umpire.

If the reference is to two arbitrators, the submission frequently provides that in case of disagreement by them the matter shall be decided by a third party, called an umpire, and even if it does not so provide, the two arbitrators must appoint an umpire immediately after they are themselves appointed, unless a

contrary intention is expressed in the submission (Arbitration Act, 1889, First Schedule, para (b), as amended by Arbitration Act, 1934, § 5 (1)). If the parties or the arbitrators, being at liberty to appoint an umpire, fail to do so, the Court may appoint (Arbitration Act, 1889, § 5 (c)). Where an appointed umpire refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy, the Court may appoint (Arbitration Act, 1889, § 5 (d)). The usual method of appointment of the umpire is by writing signed by both arbitrators in the presence of each other, but a parol appointment will not be invalid where no other mode is prescribed.

If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators, assuming no contrary intention in the submission (Arbitration Act, 1889, First Schedule para. (d)). At any time after the appointment of an umpire, however appointed, the Court may, on the application of any party to the reference and notwithstanding anything to the contrary in the arbitration agreement, order that the umpire shall enter on the reference in lieu of the arbitrators and as if he were a sole arbitrator (Arbitration Act, 1934, § 5 (2)).

When called upon to act, the umpire must proceed with the reference with all reasonable dispatch, and if he fails to do so, he is liable to be removed by the Court, upon the application of any party to the reference. If removed he shall not be entitled to any remuneration

in respect of his services (Arbitration Act, 1934, § 6 (1) and (2)).

The umpire has the same powers and duties as the arbitrators. Unless he has sat with the arbitrators all through the case and has made his own notes of the proceedings, he must re-hear the matter, and must examine such witnesses as the parties may produce, even though the arbitrators have already examined them (*Re Salkeld and Slater* (1841), 10 L.J. Q.B. 22). He must not take the evidence from notes of the arbitrators unless the parties consent to his doing so (*Re Firth & Howlett* (1850), 19 L.J. Q.B. 169), but the arbitrators can give evidence before him (*Bourgeois v. Weddell & Co.* (1924), 40 T.L.R. 261).

In commercial arbitrations, however, where it is the recognised practice that unless the parties express a desire or intention to attend or to be represented, the arbitrators themselves submit the evidence to the umpire and act as advocates, and if such a course has been adopted, the umpirage would stand (*French Government v. Tourushima Maru* (1921), 37 T.L.R. 961 C.A.).

If the umpire does actually sit with the arbitrators for the purpose of hearing the evidence, he must not interfere with them in any way (*Flag Lane Chapel v. The Mayor of Sunderland* (1859), 5 Jur. N.S. 894).

The umpire must decide between the parties to the reference, and not between the arbitrators. He must decide on all matters in dispute and not merely those upon which the arbitrators have failed to come to an agreement (*Tollit v. Saunders* (1821), 9 Price, 612), unless the submission gives him power to decide on particular points on which the arbitrators differ, in

which case the arbitrators may themselves decide on some points, and refer to the umpire those on which they disagree (*Lang v. Browne* (1855), 25 L.T. (O.S.) 297).

Where an umpire who has not entered on the reference is removed by the Court, the Court may, on the application of any party to the arbitration agreement, appoint a person to act as umpire in place of the person so removed (Arbitration Act, 1934, § 3 (1)), or where the appointment of an umpire is revoked by leave of the Court, or an umpire who has entered on the reference is removed by the Court, the Court may, on the application of any party to the arbitration agreement, either appoint a person to act as sole arbitrator in place of the umpire or order that the arbitration agreement shall cease to have effect with respect to the dispute referred (Arbitration Act, 1934, § 3 (2)).

(h) Powers of the Arbitrator.

The arbitrator, unless the submission expresses a contrary intention, has power—

(a) Under the Arbitration Act, 1889, § 7—

- (1) to administer oaths to and take the affirmations of parties and witnesses ;
- (2) to correct in an award any clerical mistake or error arising from any accidental slip or omission ;

(b) Under the First Schedule to the Arbitration Act, 1889, as amended by the Arbitration Act, 1934, § 7—

- (i) to require the parties to the reference, and all persons claiming through them, subject to any legal objection, to produce before

the arbitrator all books, deeds, papers, accounts, writings and documents within their possession or power which may be required or called for, and do all other things which during the proceedings on the reference the arbitrator may require ;

(ii) to order specific performance of any contract other than a contract relating to land or any interest in land, in accordance with the same powers as those possessed by the Court ;

(iii) to make an interim award.

(1) Duration of the Arbitrator's Authority.

The authority of the arbitrator commences from the time when the agreement to refer is entered into, unless the submission states when the reference is to begin, and is terminated by the making of the award, or the expiration of the time limited for the making of the award, or by the revocation of his authority. The authority of the arbitrator is revocable only by leave of the Court, and the Court will require proof of proper grounds before revoking the arbitrator's authority. The Court has power to appoint a person to act as arbitrator in lieu of the arbitrator whose authority is so revoked.

(j) Proceedings on the Reference.

The reference must be conducted in accordance with the terms of the submission, but subject thereto the matter will proceed as stated below.

The arbitrator fixes a time and place for the hearing, and gives notice thereof to the parties. If a party applies for an extension of time, on the ground that

he cannot be ready with his witnesses by the date fixed, the arbitrator should grant an extension if reasonable, and refusal to do so might be a ground for setting aside the award.

If one of the parties persistently refuses to appear or to produce his witnesses, the arbitrator should serve him or his solicitors with a written notice marked "Peremptory," clearly indicating that unless he appears on the date fixed by the notice, the arbitrator will proceed with the arbitration *ex parte*. If he proceeds in the absence of one of the parties without having given such a notice, the award may be set aside if the other party can show a reasonable excuse for not attending.

Although the arbitration proceedings are private, the arbitrator should not exclude interested persons without sufficient reason, but the Court is disinclined to interfere at the instance of an aggrieved party, as the matter is regarded as one for the discretion of the arbitrator. Thus, in one case, the refusal of the arbitrator to allow the attendance of a stranger who had been asked to assist the solicitor of one of the parties with technical hints was not regarded as a sufficient ground for setting aside the award (*Tillam v. Copp* (1847), 5 C.B. 211). On the other hand, the Court has set aside an award in a case where the arbitrator refused to permit the attendance of a shorthand-writer and of the son of one of the parties who was versed in the accounts relevant to the proceedings (*Haigh v. Haigh* (1861), 31 L.J. Ch. 420).

The conduct of the proceedings is in the discretion of the arbitrator, but it is desirable as far as possible that the practice of the Courts should be followed during

the hearing. He is bound to follow the rules of law and equity in arriving at his decision. Nevertheless, the fact that a decision is arrived at by the arbitrator contrary to the true legal rights of the parties will not invalidate the award unless the mistake of law actually appears upon the face of the award itself.

Any party to a submission may compel the attendance of witnesses and the production of documents by them by means of a subpœna (Arbitration Act, 1889, § 8).

If any party considers that he has cause for complaint in the conduct of the proceedings, such as where the arbitrator acts *ex parte* unjustifiably, he should at once protest and apply to the Court for the revocation of the submission or the removal of the arbitrator. He could then continue to conduct his case before the arbitrator without prejudice to his rights. If he withdrew from the proceedings, and the Court declined to interfere upon his application, he would be placed at a disadvantage.

To continue to appear without protest would raise the implication that he had waived his objection to the irregularity, and he would not be entitled to apply to the Court subsequently for the award to be set aside upon the same ground ; for it might be inferred that he would have made no such application had the award been in his favour (*Bignell v. Gale* (1841), 10. L.J.C.P. 169).

If the party is unaware of the irregularity, he cannot be deemed to have condoned it merely because he raised no protest at the time (*Jungheim, Hopkins & Co. v. Fonkelmann* (1909), 2 K.B. 948).

Where the arbitrator has heard all the evidence which the parties are prepared to offer, and has ascertained that neither party proposes to produce further evidence, he should give distinct notice to the parties that the proceedings are at an end, and that he is prepared to make his award. He may, however, at any time before making the award, permit or require the production of further evidence.

(k) Special Case.

An arbitrator may, at any stage of the proceedings in a reference, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference, or he may give his award or any part thereof in the form of a special case (Arbitration Act, 1934, § 9 (1)), even if the submission provides to the contrary. In doing this he should state the facts as he has found them, leaving the Court to settle the points of law involved. Either party may, at any time before the award is made, apply to the Court to order the arbitrator to state a case; and if the arbitrator is requested to state a case, refusal to do so, or refusal to delay his award till an application can be made to the Court, may amount to misconduct, unless the arbitrator's finding upon a question of fact renders immaterial the question raised on the point of law (*Buerger & Co. v. Barnett* (1920), 35 T.L.R. 260 D). The arbitrator should not refuse a request to adjourn the hearing pending an application to the Court for an order directing him, where he has refused, to state a case, for such would be regarded as misconduct justifying the setting aside of the award. But he may continue the proceedings where it is evident that the request to state a case was actuated by a desire to

delay them (*In re Palmer & Co. and Hisken & Co.* (1898), 1 Q.B. 131).

A special case with respect to an interim award or with respect to a question of law arising in the course of the reference, may be stated, or may be directed by the Court to be stated, notwithstanding that proceedings under the reference are still pending (Arbitration Act, 1934, § 9 (2)).

No appeal lies from the decision of the Court on a special case, without the leave of the Court or of the Court of Appeal (Arbitration Act, 1934, § 9 (3)).

(1) The Award.

Unless the submission otherwise provides, there is no time limit within which an award must be made, and the arbitrator cannot be compelled to make an award unless he has contracted to do so, but the Court may remove him unless he uses all reasonable dispatch in making his award, and in such case he forfeits his remuneration (Arbitration Act, 1934, § 6). If, however, an award has been remitted by the Court for the reconsideration of the arbitrator, he shall, unless the order otherwise directs, make the award within three months of the date of the order (Arbitration Act, 1889, § 10).

If a time limit is provided for in the submission, the arbitrator cannot himself extend or shorten the time; this can only be done by the parties themselves, or by the Court.

If there is a sole arbitrator, the award will be made by him; if there are two arbitrators who agree they will make the award, but if they do not agree the matter will go before the umpire, who will make the award;

if the reference is to three arbitrators (of whom one does not become an umpire in accordance with § 4 (1) of the Arbitration Act, 1934, but who acts as a third arbitrator), the award of any two of the arbitrators is binding (Arbitration Act, 1934, § 4 (2)).

The award must be stamped with a 10/- stamp and will be handed to any party applying for it on payment of the arbitrator's charges. A copy will be handed to any other party on application.

Unless a contrary intention is expressed in the submission, the award will be final and binding on the parties and the persons claiming under them (Arbitration Act, 1889, First Schedule, para. (h).) There is no appeal from it, the only remedy being by application to have it set aside or referred back, in circumstances which would justify the application. A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt (Arbitration Act, 1934, § 11), namely at 4 per cent.

(m) Remuneration of the Arbitrator.

Where the submission does not express a contrary intention, the arbitrator may himself fix the amount of his remuneration and may include it in his award. Any party who has not entered into a written agreement with the arbitrator fixing his fee may apply to the Court to have the fee taxed if the arbitrator refuses to deliver his award except on payment; the Court may order that the arbitrator shall deliver the award to the applicant on payment into Court of the fee demanded, and further that the fee demanded shall be taxed by the taxing officer, and that out of the money paid into Court there shall be paid out to the

arbitrator by way of fee such sum as may be found reasonable on taxation, and that the balance of the money, if any, shall be paid out to the applicant (Arbitration Act, 1934, § 13). Apart from the operation of that provision, the arbitrator has a lien on the submission and award for the amount of his charges, but the lien does not extend to documents handed to the arbitrators in the course of the reference.

. An arbitrator may bring an action to recover the amount of his remuneration against any party who has agreed, expressly or impliedly, to pay it, and it appears that there is an implied promise by the parties to a submission to pay the remuneration of a lay arbitrator. It is probable that this implication extends also to a legal arbitrator.

(n) Costs of the Arbitration.

A provision in an arbitration agreement to the effect that a party thereto shall in any event pay his own costs is void, except where such a provision relates to a dispute which has already arisen before the making of the arbitration agreement (Arbitration Act, 1934, § 12 (1)).

Unless a contrary intention is expressed in the submission, the costs of the reference and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of the costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client (Arbitration Act, 1889, First Schedule, para. (i)).

If no provision is made by an award with respect to costs, any party may within fourteen days of the

publication of the award, or such further time as the Court may direct, apply to the arbitrator for an order directing by and to whom such costs shall be paid, and thereupon the arbitrator shall, after hearing any party who may desire to be heard, amend his award by adding thereto such directions as he may think proper with respect to the payment of the costs (Arbitration Act, 1934, § 12 (2)).

If the arbitrator has a discretion as to costs, as is usually the case, his discretion is not absolute ; it must be exercised judicially. If the award states reasons for the order as to costs, from which the Court can see that the discretion has not been exercised judicially, the order can be set aside (*Lloyd Del Pacifico v. Board of Trade* (1930), 46 T.L.R. 476). The arbitrator does not exercise his discretion judicially where he takes into consideration a preliminary friendly talk without prejudice and the refusal of an offer made without prejudice (*Statesbury v. Turner* (1943), 1 K.B. 370).

(o) Setting aside the Award.

Where an arbitrator has misconducted himself or the proceedings, or an arbitration or an award has been improperly procured, the Court may set the award aside (Arbitration Act, 1889, § 11 (2), as amended by Arbitration Act, 1934, § 15).

Where an application is made to set aside an award, the Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application (Arbitration Act, 1934, § 8 (3)).

The following are instances of the circumstances in which an award may be set aside in accordance with the rules set out above :—

(i) *Misconduct on the part of the Arbitrator.*

This misconduct may be actual misconduct, such as taking a bribe; or technical misconduct, such as refusing to hear evidence, or hearing evidence in the absence of one of the parties, or calling evidence not tendered by either party, or refusing to give reasonable extension of time for producing witnesses, or refusing to state a case.

If the arbitrator is biassed, the award may be set aside; or even if he accepts hospitality from one of the parties.

In *Czarnikov v. Roth Schmidt & Co.* (1922), 38 T.L.R. 797 C.A., an award was set aside on the ground that the arbitrator had been guilty of misconduct in not allowing a case to be stated on a point of law, the arbitrator relying upon a clause incorporated in the submission that no party was to require any such case to be stated. The arbitrator should have allowed the validity of the clause to be determined by the Court.

If the arbitrator hears evidence in the absence of one of the parties, he is guilty of such misconduct as would justify the setting aside of the award, and it would be no defence to urge that such evidence was immaterial (*Royal Commission on Sugar Supply v. Trading Society Kwik-Hoo-Tong* (1923), 38 T.L.R. 684 D).

It is also misconduct if the arbitrator causes the parties to appear before him separately, and hears the evidence of each party in the absence of the other; the award will in the circumstances be set aside (*Ramsden & Co. v. Jacobs*, 126 L.T. 409).

If it is considered that there has been misconduct on the part of the arbitrator and no steps are taken

for the award to be set aside on that ground, the aggrieved party will be precluded from pleading such misconduct if an action is brought against him for enforcement of the award.

(ii) *Mistake in law or fact.*

The mistake must appear on the face of the award, or of some document forming part of it; otherwise, if the arbitrator has acted within his authority the award will hold good. To get the award set aside in respect of a mistake of fact the arbitrator must admit it, and must himself apply for relief (*Dinn v. Blake* (1875), 44 L.J.C.P. 276); unless the mistake is so gross as to amount to misconduct on the part of the arbitrator (*Re Hall and Hinds* (1841), 2 M. & G. 847).

A mistake in law appearing upon the face of the award will always lead to the award being set aside, even if the arbitrator has been misled by the opinion of the Court to which he has stated a special case on a point of law (*British Westinghouse Electric, etc., Co. v. Underground Electric Railway* (1912), A.C. 673); but not if the error is not material to the decision (*Buerger & Co. v. Barnett* (1920), 35 T.L.R. 260 D).

Where a specific question of law has been submitted to an arbitrator for his decision, and he has decided it wrongly, that alone is not a sufficient ground for setting aside the award; but where the determination of a point of law (which has not been specifically referred) becomes necessary in the decision of the matters which have been referred and the arbitrator makes a mistake apparent on the face of his award, the award can be set aside (*F. R. Absalom Ltd. v. Grant Western (London) Garden Village Society, Ltd.* (1933), A.C. 525).

The Court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award, but must take the award at its face value (*James Clark (Brush Materials) Ltd. v. Cartres (Merchants) Ltd.* (1944), 1 K.B. 566).

(iii) *If the award is not final.*

The award may be set aside if the arbitrator fails to decide on some of the matters referred ; or fails to give directions necessary for carrying out the award ; or leaves something to be afterwards determined either by himself or some other person.

The arbitrator may, however, direct in his award the doing of a ministerial act by some other person, such as the measurement of land, the arbitrator having decided what amount is to be paid per acre (*Thorp v. Cole* (1835), 2 C.M. & R. 367).

(iv) *If the award is uncertain.*

The award must show clearly what has to be done and who is to do it. The Court will always try to hold that the award is certain, and any uncertainty must appear on the face of the award. The rule is to hold as certain that which is capable of being rendered certain, the maxim being *id certum est quod certum reddi potest*. Thus a direction that an administrator shall pay to the next-of-kin their distributive shares, without saying what these are, is sufficiently certain, since this is determined by the degree of relationship which is not in dispute (*Perry v. Mitchell* (1884), 12 M. & W. 792). An award that one of two persons shall do a certain act, without stating which is to do it, is bad (*Lawrence v. Hodgson* (1826), 1 Y. & J. 16) ; but an award that one person shall do one of two things is good, if either is capable of being performed (*Lee v. Elkins* (1702), 12 Mod. 585).

The following are some instances of awards which have been held to be certain :—

An award directing that a nuisance on a defendant's soil should be removed, without saying by whom; the Court presumes that the owner of the soil is intended (*Armitt v. Breame* (1705), 2 Ld. Raym. 1076).

An order to pay a specified sum within a certain time of the date of the award, the award bearing no date; the time runs from delivery of the award (*Armitt v. Breame, supra*).

An award directing A. to pay a sum of money but mentioning no date for payment; it must be paid within a reasonable time (*Freeman v. Bernard* (1698), 1 Salk, 69).

The following are void for uncertainty :—

An award that payment for land should be made at a rate varying according as it lay on one side or other of a line which was not clearly defined (*Hopcraft v. Hickman* (1824), 2 S. & S. 130).

An award that the defendant should deliver up certain specified goods, and several books, without naming the books (*Cockson v. Ogle* (1702), 1 Lut. 550).

An award that a party shall put up certain fixtures, without defining their value or description (*Price v. Popkins* (1839), 10 A. & E. 139).

An award finding that a sum of money is due to the defendant from A. B. & C., some or one of them, and directing the sum to be paid by them, some or one of them (*Rainforth v. Hamer* (1855), 25 L.T. (O.S.) 247).

(v) *Excess of jurisdiction on the part of the Arbitrator.*

The award may be set aside where the arbitrator has decided on matters not submitted to him ; or has exceeded certain specified powers of giving directions ; or has given directions affecting strangers ; or has directed acts to be done affecting the property of strangers.

In these cases, if the excess can be separated from the rest of the award, that which is bad may be set aside and the rest upheld. If the excess cannot be separated the whole award is bad.

The following are instances of excess of jurisdiction : -

Where it was referred to an arbitrator to decide the right of a buyer to reject goods as inferior in quality, and the arbitrator awarded that the buyer should take them with an allowance (*Re Green & Balfour* (1890), 63 L.T. 97, 325).

Where the arbitrator has to decide as to the boundaries of certain land, and he decides as to title (*Doe. d. Lord Carlisle v. Bailiff, etc., Morpeth* (1811), 3 Taunt. 378).

Where he decides as to persons who are not parties to the submission, *e.g.*, directs the transfer of an apprentice or articted clerk who is not a party to the proceedings (*Fisher v. Pimbley* (1809), 11 East 188 ; *Horne v. Blake* (1710), cited in *Baxter v. Burfield*, 2 Str. 1267).

(vi) *Failure to decide on all matters submitted.*

Failure to decide on all matters submitted is ground for setting aside an award. It is not always necessary that each matter should be stated in detail ; in some cases silence may amount to a decision.

(vii) *Fraud.*

A clause in a submission, providing that the award shall not be set aside on the grounds of fraud on the part of the arbitrator, is good, and the award in such a case would not be set aside (*Tullis v. Jacson* (1892), 3 Ch. 441).

If the submission has been obtained by fraud, this would be ground for setting aside the award ; though the remedy would doubtless be to apply for the revocation of the submission, if the award has not yet been made. If the fraud is not discovered till after the award has been published, and the injured party takes up the award, this will not prevent him from taking an action for damages arising in consequence of his having been fraudulently induced to enter into the submission.

It would be good grounds for setting aside the award if such award had been obtained by fraud, as for instance, where one party has wilfully misled the arbitrator.

(viii) *Defect in execution.*

The award may also be set aside on account of a defect in its execution.

The Court will not necessarily deprive the arbitrator of his costs where the award is set aside, unless there has been gross misconduct on his part.

(p) *Referring back the Award.*

Even though an award be not set aside, it may, on application, be referred back by the Court for reconsideration by the arbitrator (Arbitration Act, 1889, § 10 (1)). The object of this is to enable the arbitrator to correct an error which would make the award bad, without entirely setting it aside.

An award may be referred back on any of the grounds which would justify the Court in setting aside an award, though if the ground is misconduct of the arbitrator, the award will not be remitted to the same arbitrator unless it is technical misconduct only.

An award may also be referred back when the arbitrator has admittedly made some mistake and desires the award to be remitted in order that he may correct it, or where there is some accidental omission, such as the failure by the arbitrator to give directions as to the payment of costs (*re Becker, Shillan & Co. and Barry Bros.* (1921), 1 K.B. 391).

A further ground for referring back an award is the discovery of fresh evidence, but the Court will not make an order remitting an award on these grounds unless the evidence is such that the tribunal of fact could properly give it some weight, and it is evidence which the party desiring to adduce it could not, by the exercise of any reasonable diligence, have procured before the first trial (*Dower & Co. v. Corrie MacColl & Son Ltd.* (1925), 42 T.L.R.).

When the award is referred back, all the original powers of the arbitrator revive, and the original award becomes void, unless it has only been remitted for amendment on a specific point.

(q) Enforcing the Award.

An award on a submission may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect (Arbitration Act, 1889, § 12). Where leave is so given, judgment may be entered in terms of the award (Arbitration Act, 1934, § 10). In this way the award is turned into a final judgment, and can be enforced by execution or any other way allowed in the case of a judgment.

(r) Time limit for Arbitrations and enforcing Awards.

The Limitation Act, 1939, and any other enactment relating to the limitation of actions apply to arbitrations as they apply to actions in the High Court (Limitation Act, 1939, § 27 (1)).

Sometimes arbitration agreements contain a term to the effect that no cause of action shall accrue until an award is made under the agreement. Notwithstanding any such term, the cause of action shall, for the purpose of the Statutes of Limitation, be deemed to have accrued at the time when it would have accrued but for that term (Limitation Act, 1939, § 27 (2)). The effect of this provision is that time will begin running from the date when a cause of action would have existed but for the arbitration clause, and not from the date of the award. When an award is made and judgment is entered in the terms of the award, the original cause of action merges in the judgment, and the right of action on the judgment will not be barred until the expiration of twelve years. Even if judgment is not entered in terms of the award, an action to enforce the award will not be barred until six years after the award is made (Limitation Act, 1939, § 2 (1) (c)), and if the award is in pursuance of a submission under seal, twelve years.

In some cases a contract containing an arbitration clause prescribes a time limit within which arbitration must be claimed. If arbitration is claimed at a later date and the arbitrator gives an award against the claimant on the grounds that he is out of time, the award will constitute a bar to any subsequent proceedings in the Courts (*Ayscough v. Sheed, Thomson & Co.* (1924), 40 T.L.R. 707, H.L.). If, however, in such circumstances the arbitrator refuses to make an

award on the grounds that he has no jurisdiction under the contract, an action will lie and the Court may in discretion refuse a stay of proceedings (*Pinnock Bros. v. Lewis & Peat, Ltd.* (1923), 39 T.L.R. 212).

In such cases, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the provisions of the Limitation Act, extend the time for such period as it thinks proper (Arbitration Act, 1934, § 16 (6), read with § 27 (3) of the Limitation Act, 1939).

Where an award is set aside or an arbitration clause is nullified by the Court, the Court may order that the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the running of time under the Statutes of Limitation (Limitation Act, 1939, § 27 (5)).

GLOSSARY

OF

Mercantile Terms and Legal Maxims

Ab initio. From the commencement.

Account Stated. An admission that a sum of money is due from one person to another from which a promise to pay may be inferred.

Act of God. An event which occurs independently of human action and which cannot be prevented, *e.g.*, earthquake, volcanic eruption.

Actio personalis moritur cum persona. A personal action dies with the person.

Ad idem. Tallying in the essential point.

Ad valorem. According to the value, as in the case of the Stamp Duties on bills of exchange and promissory notes.

Affidavit. A statement in writing and on oath, sworn before a person having authority to administer oaths.

Appraisement. A valuation.

Authorised Securities. Securities in which a trustee is authorised to invest the funds of a trust, either by authority of the trust instrument, the Colonial Stock Act, 1900, the Trustee Act, 1925, or the National Loans Act, 1939.

Barratry. Wilfully wrongful or fraudulent acts committed by the master or seamen of a vessel, causing damage to the ship or cargo, and to which the owner is not a consenting party, *e.g.*, scuttling or setting fire to the ship.

Blockade. An operation of war by which one of the belligerents is able to apply his forces in such a manner as to render it dangerous to attempt to enter or leave the place blockaded.

Catching bargain. A contract for a loan made with expectant heirs for an inadequate consideration; advantage being taken of the necessitous position of the borrower.

Caveat Emptor. Let the buyer take care. A legal maxim expressing the principle of law that, subject to certain exceptions, there is no duty on the vendor to disclose defects in the goods sold.

Charging Order. An order obtained by a judgment creditor, charging the property of the judgment debtor with payment of the judgment debt and interest. This applies to such cases as an order charging the share in a partnership in respect of a judgment debt of a partner, made in favour of his judgment creditor.

Chattels Personal. Movable property or pure personalty.

Chattels Real. Interests in land less than freehold which formerly devolved as personalty, i.e., leaseholds (*N.B.* Real and personal property are now governed by the same rules of intestate succession.)

Chose in Action. Property which cannot be the subject of physical possession, such as a debt or other right of action.

Chose in Possession. Property which is physically possessed, such as furniture.

C.I.F. Cost insurance and freight included in the price.

Clog on Redemption. A provision in a mortgage deed which attempts to deprive the mortgagor of his right to redeem absolutely and at any time.

Condition precedent. A condition to be fulfilled before the main purpose of the contract is to be performed.

Condition subsequent. A condition, the failure or non-performance of which would entitle the other party to a contract to avoid transactions already completed.

Consols. That part of the National Debt which is secured upon the Consolidated Fund of the United Kingdom; now bearing interest at $2\frac{1}{2}$ per cent per annum, payable quarterly.

Contraband. Goods prohibited to be imported or exported. Contraband of war is munitions of war and other such goods as could be used by one of the belligerents against the other, carried in a neutral ship.

Conversion. The converting by a man to his own use of the goods of another.

Copyhold. The tenure of land forming part of a manor, at the will of the lord of the manor, evidenced by a copy of the Court Roll. It is now obsolete, having been abolished by the Law of Property Act, 1922.

Corpus delicti. The gist of the offence.

Covenant. A clause of a deed whereby one of the parties binds himself to do or to refrain from doing some act.

Coverture. The condition of being a married woman.

Curator. A guardian.

Damnum sine injuria. Damage without infringing a legal right, i.e., without giving a right of action to the person aggrieved.

Dead Freight. Damages payable by a charterer in respect of cargo not shipped.

Decree of Foreclosure. This is an order of the Court, addressed to a defaulting mortgagor, requiring him to pay off the mortgage, with interest and costs, within a specified time, or in default to lose his equity of redemption.

De facto. In fact.

Defeasance. A collateral agreement in connection with a conveyance of land, containing certain conditions upon the performance of which, the conveyance may be defeated.

De jure. By right.

Delegatus non potest delegare. A delegate cannot delegate; e.g., an agent cannot, without authority, depute another to carry out the work entrusted to him.

Delivery Order. An order signed by the owner of goods, instructing the Dock Authorities to deliver goods specified in a Dock Warrant to the bearer of the order. It passes the title to the goods by indorsement and delivery.

Demurrage. The charge made for detaining a ship, or failing to ship the cargo within the specified lay days. The term is also applied to the charge made for detention of railway trucks.

De novo. Afresh.

Detinue. An action whereby the plaintiff seeks to recover possession of goods unlawfully detained from him.

Dock Warrant. A document representing goods warehoused at the Docks, given to the owner as a recognition of his title to the goods. It passes the title to the goods by indorsement and delivery.

Documentary Bill. When the seller of goods to a customer abroad wishes to obtain payment or some form of security before the goods are actually delivered, he will draw a bill upon the consignee for the value of the goods, and attach thereto a copy of the invoice, the insurance policy and the bills of lading. These documents he will hand to his banker, who in turn will forward them to his own correspondent, at the place where the consignee of the goods resides. A cash advance against the documents may be obtained from the banker and the consignor thus placed in funds even before the goods are on the sea. When this is done the bank will require a *Letter of Hypothecation* empowering it to sell the goods in the event of the default of the consignee. The bank may also require the deposit of securities by the consignor.

To enable him to get the goods, the consignee must have the bill of lading, and he cannot get this unless he either accepts or meets the bill according to the arrangement made. Such a bill is called a Documentary Bill. As a general rule the fact that the bill has been drawn upon him is notified, and if he accepts such bill before the arrival of the goods he will accept conditionally "Cash against documents."

The English banker, upon receiving notification from his correspondent that the bill has been met, will credit the seller of the goods therewith, subject to his collecting charges, or with any balance due after deducting any sum already advanced.

Domicil. The place where a man has or is presumed to have a fixed and permanent home to which when absent it is his intention to return.

E. & O. E. Errors and omissions excepted.

Easement. A right enjoyed by one person over the property of another, *e.g.*, a right of way.

Embargo. An order of the Crown prohibiting ships from leaving a port.

Entail. The settlement of property so that it passes to a person and his specified heirs.

Equitable Execution. The attachment of the equitable interest of a judgment debtor in favour of a judgment creditor by the appointment of a receiver, when such judgment cannot be enforced in the ordinary way.

Equities. An assignment subject to equities is one whereby the assignee takes subject to any defences which could be set up against his assignor.

Equity of Redemption. The right of a mortgagor to redeem mortgaged property on the payment of principal money, interest and costs, after the contractual date of redemption has passed.

Escrow. A deed delivered to a person who is not a party thereto, and which does not operate until the fulfilment of some condition.

Estoppel. A rule of evidence whereby, in certain circumstances, a party to an action is prevented from making allegations which are contrary to that which has already been decided against him, or to that which he has himself represented to be the fact.

Ex delicto. Arising out of wrongs.

Ex nudo pacto non oritur actio. Out of an "empty" agreement, i.e., one without consideration, no action can be brought.

Ex officio. By virtue of his office.

Ex parte. An application in a judicial proceeding made by one party in the absence of the other, or where there is no defendant cited, e.g., upon an application for directions.

Ex turpi causa non oritur actio. No action can be brought on a contract which offends against public policy or morality.

Exchequer Bills. Bills issued by the Treasury to raise moneys for the temporary purposes of the Exchequer. They are bearer documents with interest coupons for five years attached, although the rate of interest is not stated, as it is only fixed for one year from the date of issue, at the expiration of which repayment of principal can be demanded or the bills may be renewed.

Exchequer Bonds. Bonds issued by the Treasury to raise money for a fixed period not exceeding six years. The rate of interest is determined at the date of issue for the whole period, and the

amount payable is printed on each coupon. The bonds are either to bearer, or they may be registered at the Bank of England, in which case a certificate of registration will be issued in lieu of bonds.

Execution. The final process of an action whereby the judgment is enforced.

Factor. A mercantile agent entrusted with the possession of goods for the purpose of selling them for his principal. Such an agent may deal with the goods in his own name.

False Pretences. This arises where goods or money are obtained from the owner by fraudulent means in circumstances not amounting to larceny.

Falsify. To prove a thing to be false, *e.g.*, to falsify the items of an account before the Court. The term is also applied to a fraudulent alteration.

F.A.Q. Fair average quality.

F.A.S. Free alongside ship, *i.e.*, the seller pays all charges in respect of the goods until they reach the side of the ship, after which charges are to be paid by the buyer

Feme covert. A married woman.

Feme sole. A single woman.

Fiduciary. One who stands in the position of a trustee or similar relationship to another.

Flotsam. Goods lost by shipwreck, floating upon the water; if not claimed within a year and a day they belong to the Crown.

F.O.B. Free on board. Goods f.o.b. are not at the buyer's risk until they are put on board the ship.

F.O.R. Free on rail.

Force majeure. The right of a Government to exercise control over the property of citizens or to bar the performance of contracts, where, in a condition of national emergency such action is in the interests of the State.

Foreclosure. (*See Decree of Foreclosure.*)

Freehold. The absolute ownership of land, subject only to the fictitious lordship of the King. It is known as "an estate in fee simple."

Garnishee Order. An order of the Court to a person who is indebted to a judgment debtor, ordering that person not to pay the debt to his creditor (the judgment debtor), but to the judgment creditor in whose favour the order is made.

Hypothecation. The pledging of property to secure a debt, without giving up possession of such property.

Ibid. The same.

Ignorantia juris neminem excusat. Ignorance of the law excuses no man

Inchoate. Incomplete.

Injunction. An order of the Court restraining a person either permanently or for a specified time, from doing a certain act or commanding him to perform a certain act.

International Law. The law which is recognised as between nations.

I.O.U. A written acknowledgment of a debt.

Ipso facto. By the mere fact.

Jetsam. Goods thrown overboard (or jettisoned), to lighten the ship.

Larceny. The unlawful taking of a man's goods without his consent, with the intention of permanently depriving him of them, i.e., theft.

Law Merchant. The customs of merchants as settled by judicial decisions.

Leasehold. Leasehold tenure consists of an interest in land less than freehold, and is generally for a term of years, though it may be at will, for a rent reserved. The tenancy created involves both privity of contract and privity of estate (q.v.).

Legal Personal Representative. That person, whether executor or administrator, who is by will or by the Court charged with the administration of the estate of a deceased person, and in whom the estate is vested for the purpose of distribution.

Lien. The right to retain possession of a thing until a claim is satisfied.

An *equitable lien* is a right over goods whereby disposal is to be effected so as to protect the interests of the person in whom the right resides (e.g., a partnership lien).

A *maritime lien* is a lien on a ship or freight until certain charges incurred (e.g., for wages of seamen) have been discharged.

Lloyd's. An association of underwriters and brokers who carry on business of insurance principally against marine risks.

Lloyd's Bond. A form of bond or obligation somewhat analogous to a debenture, issued by a railway company, for payment of capital expenditure for which it has made itself liable in excess of its borrowing powers.

Mala fides. Bad faith. The opposite to *bona fides*.

Malfeasance. The doing of an illegal act

Manifest. The document signed by the master of the ship, specifying the ship, and describing the goods loaded therein. This document must be delivered to the proper officer of customs within six days after the final clearance of the ship.

Man of Straw. One who is not capable of justifying any credit that may be reposed in him.

Material Men. (1) Those in whom credit may be placed with safety, owing to their undoubted capacity to meet obligations incurred; men of substance as opposed to men of straw.

(2) Persons who supply necessities to a ship, such as shipwrights.

Merchantable Quality. Saleable quality.

Misfeasance. The wrongful performance of a legal act.

Municipal Law. The internal law of the State as opposed to International law. Sometimes used erroneously for describing the law relating to Municipal Authorities, which should properly be termed the law relating to Local Authorities.

Mutatis mutandis. With the necessary changes in points of detail.

Nemo dat quod non habet. No one gives who possesses not, i.e., no one can give a better title than he himself possesses.

Nonfeasance. The omission to do something which a person is bound to do by law.

Notary Public. A person, generally a solicitor, who attests deeds or writings (usually bills of exchange) so as to enable recovery to be effected in another country.

Official Receiver. A person appointed by the Board of Trade, and attached to a Court having bankruptcy jurisdiction, for the purpose of acting as receiver of the property of any person against whom a Receiving Order in Bankruptcy may be made. He is also appointed provisional liquidator in the case of a company against which a compulsory Winding-up Order is made.

Originating Summons. A summons whereby proceedings may be commenced in the Chancery Division of the High Court without the issue of a writ, *e g* , to obtain the instructions of the Court upon a particular matter arising in the administration of a trust when a general administration is not required.

Personalty. All property which in the case of a person dying intestate before 1st January, 1926, would descend in accordance with the Statutes of Distribution, and which consists of movable property and chattels real.

Post obit Bond. A bond by which the borrower binds himself to pay a sum exceeding that borrowed, together with interest thereon, upon the death of a person from whom he expects to receive property

Power of Attorney. An authority under seal given by one person to another, authorising that other to act for him on his behalf.

Primage. Formerly a payment due to sailors for loading the ship, or a contribution proportionate to the freight, payable to the captain. Now an additional charge for use of cables, ropes, etc , in dealing with the cargo

Privity of Contract. Contractual relationship

Privity of Estate. The legal relationship existing between the owner of land and the person in lawful possession thereof, *e g.*, landlord and tenant, or landlord and an assignee of the lease.

Pro hac vice. For this occasion.

Public Trustee. A corporation sole created by the Public Trustee Act, 1906, to act as trustee to any person choosing to employ him subject to the limitations of the Act. He is an official of the State.

Qui facit per alium facit per se. He who does a thing through another does it himself. A legal maxim, expressing the principle of law that a man is legally responsible for the acts of his agent or servant.

Quantum meruit. As much as he has gained.

Quod per me non possum, nec per alium. What I cannot do in person I cannot do by proxy.

Realty. Realty is all property which, in the case of a person dying intestate before 1926, would descend to the heir-at-law. It consists of freehold property, and in certain rare instances shares of corporations.

Receiver. A person appointed by the Court, or by an individual to take possession of property for its protection, or to receive the rents and profits arising from certain property, and apply them as directed.

Recognisance. An obligation or bond acknowledged before some Court of Record or authorised officer and enrolled in some Court of Record.

Re-Exchange. The loss arising from the dishonour of a bill in a country other than that in which it was drawn or indorsed.

Remainderman. Any person other than a reversioner who has a future estate in land dependent on the determination of a prior estate in the same land. The term is also frequently employed in the case of succession to estates comprising personalty.

Remoteness of Damage. Insufficiency of the direct relation between the wrong complained of and the damage suffered.

Replevin. A redelivery of goods to the owner from whom they have been taken by distress, upon security that the validity of the distraint will be decided by the Court.

Reversion. The residue of estate left in the grantor whereby he retakes possession after the determination of a particular estate granted by him.

Reversionary Interest. An interest in real or personal property in remainder or reversion.

Right of Angary (Droit d'angarie). The right of a State in time of necessity to seize ships, carts, or other means of conveyance belonging to private persons for the service of the State.

Right in Personam. A right of action other than a right in rem.

Right in Rem. A right of action in which the claimant is enabled to arrest the property and to have it detained until his claim has been adjudicated upon.

Robbery. Theft from the person accompanied by violence.

Scrip. A certificate issued by a company or other corporation indicating that the holder is entitled to certain shares or stock for which the share or stock certificates have not yet been issued.

Ship's Husband. A person appointed by the owners of a British ship to manage the ship

Special Damage. Damage which in any particular case may be claimed by the plaintiff beyond the damage ordinarily recoverable in like cases

Stoppage in Transitu. The right of an unpaid vendor in certain circumstances to arrest the goods sold after delivery to the carrier and before delivery to the purchaser

Strike Clause. A clause in a contract, whereby an extension of time for carrying out the contract is allowed if the delay is caused by strikes

Subrogation. The doctrine of substituted right; *e.g.*, where one person after indemnifying another under a contract of indemnity becomes entitled to the rights of the person indemnified in respect of the loss

Summons. (1) A citation to appear before a Court of Summary Jurisdiction

(2) An application to a Judge or Master in Chambers.

Surcharging. To show an omission of something for which credit ought to have been given in an account before the Court, so that the accounting party may be charged therewith.

Tale quale. "The same as." A term used in contracts for the sale of grain, etc., by sample, the vessel conveying the bulk having not yet arrived. It indicates that the bulk is of the quality of the sample, and that the buyer takes the risk of any damage to the goods subsequent to the sale.

Tenant for Life. One who takes a life interest in real estate or personal property. The expression properly applies only to an interest in land, but is frequently used with regard to personalty.

Tipstaff. An officer of the Court whose duty it is to arrest persons guilty of contempt of court.

Tort. A civil wrong, other than a breach of contract, or trust in respect of which an action of tort can be brought, *e.g.*, libel, assault, trespass, etc.

Tortfeasor. A person who commits a tort.

Trover. A form of action at law based on the supposed finding by the defendant of the goods of the plaintiff, and the conversion of them by the defendant to his own use. The plaintiff cannot recover the specific goods, but only damages for the conversion.

Usance. The customary period at which bills were at one time drawn between one country and another; usances are now practically obsolete.

Writ of Elegit. A writ whereby execution can be levied on lands of a judgment debtor.

Writ of Fi. fa., or Fieri facias. A writ whereby the sheriff levies execution on the goods of a judgment debtor.

Writ of Summons. A writ by which an action is commenced. It calls upon the defendant to cause an appearance to the action to be entered for him within eight days of service, and in default of compliance the plaintiff may proceed to judgment and execution.

Writer to the Signet. A person who performs, in the Supreme Courts of Scotland, functions similar to those of a solicitor.

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